March 1, 2010

From Radical to Practical (and Back Again?): Reparations, Rhetoric, and Revolution

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From Radical to Practical (and Back Again?): Reparations, Rhetoric, and Revolution

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Abstract

This Article analyzes the history of slavery reparations advocacy since the Civil War and the role of different rhetorical approaches to reparations. It shows how reparations dialog over time has consisted of two major rhetorical strands: Practical Reparations arguments are those seeking concrete compensation within existing judicial or legislative systems, while Radical Reparations arguments are those that use the idea of reparations as a lens to suggest broad systemic changes to society. Each strand draws on different facets of reparations thought.

Recent court developments cast these differences into sharp relief. Reparations lawsuits represented a new flavor of discussion, an apogee for the Practical side of reparations rhetoric. Lawsuits created their own narrative. They offered potential benefits for the movement, but also created some disadvantages because of their limited scope and inherent race-blind nature.

Lawsuit failure offers a chance to reassess the reparations narrative. It shows some of the problems with too practical of a framework, and ultimately demonstrates the need to more effectively balance both practical and radical approaches to reparations. Ultimately, reparations advocates will be most effective when drawing on narratives that can effectively incorporate both the practical and radical strands of reparations thought.

* Assistant Professor of Law, Thomas Jefferson Law School. Thanks to Al Brophy, Roy Brooks, Jack Chin, Karla Momberger Lant, Eric Yamamoto, and to participants at workshops at Thomas Jefferson School of Law, LaVerne Law School, and the Southern California Junior Professors Writing Group for very helpful comments. Any errors are mine.
The story of reparations advocacy is a story of ideas. Reparationists use a variety of approaches to describe their goals. The language of slavery reparations varies widely – it can be radical or practical, framed in dry legalese or soaring moral sermons. These rhetorical choices are more than just semantic differences. They illuminate reparations goals, shape the debate, ultimately create or close off possibilities for reparations action.

Framing is especially important because of the unusual position of the reparations movement, with signs of danger mixed with signs of promise. Federal courts recently dismissed two different cases seeking different kinds of reparations for slavery, effectively bringing to a close the possibility of achieving reparations through the courts.¹ A lawsuit-propelled settlement, like those in the tobacco or Holocaust cases, is now unlikely. And public support for reparations, particularly among non-Blacks,² remains alarmingly low, with some recent surveys placing white support for reparations at a mind-boggling 5%.³ Broad legislative responses are also unpromising. Rep. John Conyers, Jr. has introduced a proposed bill to study the effects of slavery in every Congress since 1989, but the bill has never made it to a vote.⁴

¹ See Alfred Brophy, Reparations Pro & Con 97-98 (2006) (discussing recent decisions dismissing the consolidated lawsuit in In re African American Slave Descendants, and the more limited suit seeking restitution for harms suffered in the Tulsa race riot) [hereinafter Brophy, Pro & Con].

² Throughout this Article I will use the term “Black” rather than “black” or “African-American.” Cf. Kimberle W. Crenshaw, Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, 101 Harv. L. Rev. 1331, 1332 n.2 (1988) (“I shall use ‘African-American’ and ‘Black’ interchangeably. When using ‘Black,’ I shall use an upper-case ‘B’ to reflect my view that Blacks, like Asians, Latinos, and other ‘minorities,’ constitute a specific cultural group and, as such, require denotation as a proper noun.”).


⁴ Id. at 50 (discussing history of H.R. 40); see also id. at 191-97 (text of the proposed bill); John Conyers, Reparations: The Legislative Agenda, 29 T. Jefferson L. Rev. 151, 151 (2007).
On the other hand, there have been recent positive developments, sometimes simultaneous with negative results. Discussion of reparations remains at an all-time high, with new academic conferences and symposia proliferating. Even more curiously, certain specific and targeted proposals, such as local apologies and information-spreading statutes, are actually succeeding on the legislative front. For example, California passed legislation requiring that insurance companies disclose their ties to slavery. Similarly, ordinances passed in Chicago, Detroit, and Los Angeles require that companies doing business with the city disclose any connection with slavery.

How does this mix of success and failure reflect the kinds of arguments used in the debate? This article sets out the intellectual history of reparations. It examines reparations rhetoric and its role in the movement’s successes and failures. Part I of the Article briefly sets out some of the principal arguments used by reparations advocates through 2000. Part II shows that reparations advocacy has been an interplay between two types of argument, radical and practical. Part III discusses post-millennial reparations advocacy and the rise and fall of reparations lawsuits. Part IV analyzes the failure of the legal narrative, and discusses its effects on the reparations movement. Finally, Part V looks at ways to rebuild reparations narratives to draw on the strengths of both practical and radical rhetorical approaches.

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6 Brophy, Pro & Con, supra note 1, at 31, 51, see also id. at 199 (text of California registry).

7 Id. at 32, 51, see also id. at 201 (text of Chicago ordinance).
I. A Short History of Reparations Advocacy, 1865 to 2000

A review of reparations arguments over the past 150 years reveals some interesting patterns. Slaves and their descendants have sought compensation for their enslavement since antebellum times; some early reparations proposals actually predate the Civil War. However, the first major wave of reparations discussion came immediately after the Civil War. These included private attempts by freed slaves to receive compensation for their services. These also included broad, national calls for slavery compensation, especially in the form of land. In particular, Radical Republican politicians like Thaddeus Stevens and Charles Sumner called for a massive land redistribution to freed slaves from Southern landowners. These proposals echoed the suggestion from General William T. Sherman – put into practice for a brief period by the Union army – that freed slaves receive “forty acres and a mule” from confiscated Confederate property and surplus army animals.

Each of these efforts were ultimately unsuccessful. General Sherman’s field order was cancelled by President Johnson; the Radical Republican proposals were not accepted in Congress; and restitution was transferred to the Freedmen’s Bureau, which was limited

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8 See Brophy, Pro & Con, supra note 1, at 20 (discussing antebellum proposals for slavery reparations).
10 See Brophy, Pro & Con, supra note 1, at 21-22 (letter from Jourdoun Anderson seeking back wages).
11 Rhonda Magee notes that “most of the earliest reparations proposals involved the redistribution of land in the South.” Magee, supra note 9, at 886.
12 See Magee, supra note 9, at 886-89 (describing proposals of Stevens, Sumner, and others); Brophy, Pro & Con, supra note 1 at 26-27.
13 Magee, supra note 9, at 889-90; Brophy, Pro & Con, supra note 1, at 25; see also id. at 183-85 (setting out the text of Sherman’s Field Order No. 15).
in its authority and ultimately proved ineffective at achieving land redistribution.\textsuperscript{14} Attempts to collect back wages through the Bureau also failed.\textsuperscript{15} (A few Blacks received land through race-neutral avenues like the Southern Homestead Act of 1866.\textsuperscript{16})

In 1890, Congressional Republicans introduced a bill to pay small pensions to former slaves, but it failed to gain much support.\textsuperscript{17} Some advocates continued pushing for a pension bill for decades, but were unsuccessful and the movement eventually died out.\textsuperscript{18} (Incredibly, government officials then prosecuted and convicted some of those reparations advocates on charges of “instill[ing] false hope in the hearts of the ex-slaves”!\textsuperscript{19}) Other pre-World War I proposals included an unsuccessful lawsuit seeking a portion of cotton taxes for former slaves, and letters to the President.\textsuperscript{20} All of these early attempts to receive compensation were unsuccessful, and they ended early in the 20\textsuperscript{th} century.\textsuperscript{21}

Fifty years after the Civil War, reparations dialog shifted radically. One leading figure in the shift was Marcus Garvey, a Jamaican immigrant and political firebrand who galvanized Black opinion in the 1920s until he was finally silenced by J. Edgar Hoover.\textsuperscript{22}

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\textsuperscript{14} Brophy, Pro & Con, supra note 1, at 27 (noting that “the overwhelming response” in Congress to Radical Republican proposals for reparations “was one of opposition”); \textit{id.} at 24-27; Magee, supra note 9, at 888-92 (describing the failure of reparations proposals).
\textsuperscript{15} Magee, supra note 9, at 890-91.
\textsuperscript{16} Roy Brooks, Atonement and Forgiveness 8 (2004).
\textsuperscript{17} \textit{Id.} at 8-9.
\textsuperscript{18} \textit{Id.} at 9; Brophy, Pro & Con, supra note 1, at 34.
\textsuperscript{19} Brooks, supra note 16, at 9.
\textsuperscript{20} Brophy, Pro & Con, supra note 1, at 34 (discussing early attempts to receive pension payments or tax refunds from slave-raised cotton). \textit{See generally} Mary Frances Berry, My Face is Black is True: Callie House and the Struggle for Ex-Slave Reparations (2005) (giving history of movement for Black pensions).
\textsuperscript{21} Brophy, Pro & Con, supra note 1, at 97-98 (discussing early lawsuits dismissed in the 1910s).
\textsuperscript{22} \textit{Id.} at 34 (giving background on Marcus Garvey); \textit{see generally} Colin Grant, Negro with a Hat: The Rise and Fall of Marcus Garvey (2008) (history of Marcus Garvey and the African repatriation movement).
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Garvey untiringly promoted the idea of repatriation to Africa through his United Negro Improvement Association.\(^{23}\) In 1920, the UNIA elected Garvey as Provisional President of Africa and adopted a Garvey-penned Declaration of Rights of the Negro Peoples of the World, stating that “we, the duly elected representatives of the Negro peoples of the world, invoking the aid of the just and Almighty God, do declare all men, women, and children of our blood throughout the world free citizens, and do claim them as free citizens of Africa.”\(^{24}\) The Declaration continued: “We declare that Negroes, wheresoever they form a community among themselves, should be given the right to elect their own representatives to represent them in legislatures, courts of law,”\(^ {25}\) and later, “we believe in the inherent right of the Negro to possess himself of Africa.”\(^ {26}\) “We hereby demand that the governments of the world recognize our leader” and give Blacks “complete control of our social institutions”; and “we declare the League of Nations void” were just a few of the Declaration’s other claims.\(^ {27}\) Garvey followed this up with a series of related speeches over the next several years: The goal was to “build up Africa as a Negro Empire [for] every Black man, whether he was born in Africa or the western world”;\(^ {28}\) the UNIA sought “immediate establishment of an African nation” at various dates, including 1922;\(^ {29}\) White America was the foe, and “the Ku Klux Klan represents the spirit, the feeling, and the attitude of every white man in the United States of

\(^{23}\) Id.

\(^{24}\) Marcus Garvey, Selected Writings and Speeches of Marcus Garvey 16, 18 (Bob Blaisdell, Ed., 2004).

\(^{25}\) Id. at 18.

\(^{26}\) Id. at 19.

\(^{27}\) Id. at 21-22.

\(^{28}\) Id. at 72.

\(^{29}\) Id. at 73.
America.” Garvey continued until his untimely arrest and deportation cut short his political career.

Through the 1960s and 1970s, the reparations movement abandoned Garvey’s repatriation ideas, but remained tied to Black Power groups. In 1969, activist James Forman made headlines when he demanded large payments from churches. Forman’s demand was part of a Black Manifesto reflecting radical proposals for societal reconstruction. The Manifesto stated, “we shall liberate all the people in the United States, and we will be instrumental in the liberation of people the world around.” It advocated “revolution, which will be an armed confrontation and long years of sustained guerilla warfare inside this country” seeking “a society where the total means of production are taken from the rich and placed into the hands of the state for the welfare of all people.” The Manifesto contemplated a socialist society led by Blacks only; whites and members of other races “must be willing to accept Black leadership.” In addition to the monetary demand of $500 million, the Manifesto contained a spending plan calling for cooperative farms, Black publishers and television stations, and massive educational spending. And it called on Blacks to “seize the offices, telephones, and printing apparatus” of white churches, in a targeted campaign of “total disruption.” Another radical group around this time was the Republic of New Africa. The group, formed by

30 Id. at 75.
31 Brophy, Pro & Con, supra note 1, at 37-38.
32 Id. at 37 (discussing Forman’s demands).
34 “The Black Manifesto,” in Lecky & Wright, supra note 33, at 114, 116.
35 Id. at 117.
36 Id. at 118.
37 Id. at 120-21.
38 Id. at 122-23.
500 activists in 1968, demanded that Blacks be given land in five Southern states, which would then be made into an independent Black nation.\textsuperscript{39}

Martin Luther King spoke in favor of reparations as well, though less forcefully than other more radical activists. Dr. King wrote that “no amount of gold could provide an adequate compensation for the exploitation and humiliation of the Negro in America . . . Yet a price can be placed on unpaid wages.” He continued, suggesting a “massive . . . settlement” payment to represent compensation for stolen labor.\textsuperscript{40} However, as Lee Harris notes, “while Martin Luther King and several civil rights leaders of the time did believe in reparations, that issue to them was never central.”\textsuperscript{41}

Law professor Boris Bittker made a different set of reparations arguments in his 1973 book \textit{The Case for Black Reparations}, which was an important early attempt to understand reparations in legal terms.\textsuperscript{42} Bittker carefully analyzed the potential claims for harms of slavery. He ultimately concluded that most types of reparations for slavery itself were not feasible.\textsuperscript{43} Instead, Bittker suggested focus on Jim Crow issues, especially desegregation claims that might be brought under §1983.\textsuperscript{44} However, his analysis was

\textsuperscript{40} Martin Luther King, Jr., \textit{Why We Can’t Wait} 150-51 (1964); \textit{see also} Anthony Cook, \textit{King and the Beloved Community: A Communitarian Defense of Black Reparations}, 68 Geo. Wash. L. Rev. 959, 962 (2000); Brophy, Pro & Con, \textit{supra} note 1, at 224. \textit{See also} David Boyle, \textit{Unsavory White Omissions? A Review of Uncivil Wars}, 105 W. Va. L. Rev. 665, 689 (2003) (arguing that “King may have never mentioned reparations for slavery as such, but his words show he would likely not have been uncomfortable with the idea”).
\textsuperscript{42} See Boris Bittker, \textit{The Case for Black Reparations} (Beacon Press 2003) (1973); \textit{see also} Brophy, Pro & Con, \textit{supra} note 1, at 38-40 (discussing Bittker’s role in the reparations debate). For another early discussion, see Graham Hughes, \textit{Reparations for Blacks?}, 43 NYU L. Rev. 1063 (1968).
\textsuperscript{43} Bittker, \textit{supra} note 42, at 135-37.
\textsuperscript{44} Bittker, \textit{supra} note 42, at 9-10; \textit{see also} Magee, \textit{supra} note 9, at 901-03 (discussing Bittker’s analysis).
not widely accepted; and it was criticized by radical scholars including Derrick Bell.\(^\text{45}\)

While admiring of Bittker’s project, Bell suggested that reparations proposals were effectively blocked by white self-interest.\(^\text{46}\)

An important shift in the discussion took place in 1987, in an article by Mari Matsuda discussing reparations and causation.\(^\text{47}\) Matsuda argued that law systematically undervalues the experience of the oppressed, using reparations as one illustration of that point.\(^\text{48}\) She argued that traditional views on causation help perpetuate existing power structures, and suggested that reparations could be achieved only if the law bypassed traditional ideas of proximate causation and individual connection between wrongdoer and victim, in favor of “an expanded version of legal liberalism” based on “new connections between victims and perpetrators.”\(^\text{49}\) Matsuda suggested that to avoid problems such as limitations and laches required “something other than a rigid conception of timeliness.”\(^\text{50}\) Her overall project was a criticism of existing legal theory and a proposal that law “look to the bottom” and incorporate ideas from the oppressed.\(^\text{51}\) Her goal was “the transformation of an unjust into a just world.”\(^\text{52}\) Matsuda’s article opened the door to further legal discussions.

\(^{45}\) See Derrick Bell, Dissection of a Dream, 9 Harv. C.R-C.L. L. Rev. 156, 162 (1974) (reviewing Bittker). See also Magee, supra note 9, at 903 (noting that Bittker was “ignored by racial theorists of his era”).

\(^{46}\) Bell, supra note 45, at 165 (arguing that Bittker’s analysis was unlikely to convince white elites who saw no self-serving interest in Black reparations); see also Magee, supra note 9, at 908-10 (discussing Bell’s critique of Bittker).


\(^{48}\) Id. at 324-41, 374-98.

\(^{49}\) Matsuda, supra note 47, at 374.

\(^{50}\) Id. at 381.

\(^{51}\) Id. at 340-53; 398-99.

\(^{52}\) Id. at 353.
In 1993, two law reviews published articles on reparations.\textsuperscript{53} Both focused on the political aspects of reparations. Rhonda Magee’s article adopted an explicitly critical approach.\textsuperscript{54} She argued that the colorblind approach of the political system prevented it from addressing underlying problems of racial injustice.\textsuperscript{55} She argued that reparations for Blacks have been ignored because there is no white self-interest in them, and that inattention to reparations is driven by inherent racism in the political system.\textsuperscript{56} However, she also suggested that by adopting an outsider perspective, it would be possible to attain reparations in the system.\textsuperscript{57} Vincene Verdun’s article focused in particular on the idea of liability for racism, and an approach of political strategy rather than legal claims.\textsuperscript{58}

Finally, in 2000 Randall Robinson’s book \textit{The Debt} was published.\textsuperscript{59} It was written for a general audience. In it, Robinson discussed the many sociological gaps between Blacks and whites in America, and tied these to the cultural and psychological legacies of slavery. Robinson argued that the aggregate unpaid labor that slaves performed created a debt, payable by America to Blacks.\textsuperscript{60} Robinson’s book was instrumental in helping further popularize the topic of reparations.\textsuperscript{61}

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\item[\textsuperscript{53}] Magee, \textit{supra} note 9; Vincene Verdun, If the Shoe Fits, Wear It: An Analysis of Reparations to African Americans, 67 Tul. L. Rev. 597 (1993).
\item[\textsuperscript{54}] Magee, \textit{supra} note 9, at 866-67 (stating that this article would examine the question from a consciously critical minority perspective).
\item[\textsuperscript{55}] \textit{Id.} at 898-900.
\item[\textsuperscript{56}] \textit{Id.} at 908-12.
\item[\textsuperscript{57}] \textit{Id.} at 911-12. \textit{See also id.} at 913 (“Critical scholars will be the ones who craft racial justice out of contemporary doctrine.”)
\item[\textsuperscript{58}] Verdun, \textit{supra} note 53, at 633-39. Verdun argues that society, in regards to slavery, is the ultimate wrongdoer. The list of wrongdoers covers such a vast spectrum of society that all of society should be held liable. \textit{Id.}
\item[\textsuperscript{59}] Randall Robinson, \textit{The Debt} (2000).
\item[\textsuperscript{60}] \textit{Id.}
\item[\textsuperscript{61}] \textit{See, e.g.,} Brophy, Pro & Con, \textit{supra} note 1, at 69-71 (discussing the effects of Robinson’s book).
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The history of reparations dialog up to 2000 shows a pattern of ebb and flow. It began with relatively simple proposals for pensions or other modest compensation. By the 1930s, the movement had grown radicalized, with claims for repatriation, large-scale property transfers, and other radical remedies. During the 1980s and more in the 1990s, the movement began to shift again, with legal scholars beginning a discussion of remedies in legal journals. This presaged an important shift that took place around 2000. Before looking at that shift, we will analyze some patterns and ideas from prior reparations dialogue.

II. Practical and Radical Approaches to Reparations

In reviewing reparations history, it becomes clear that advocates have taken some very different approaches to the idea, framing their reparations goals quite differently at different points in time. Some reparations advocates have advocated a very practical approach to reparations, seeking compensation within the existing system. Other advocates had much more radical goals of societal reconstruction. These two basic approaches characterize a century and a half of reparations rhetoric; each approach has been dominant at times, and less dominant at others. That is, reparations discourse over the past 150 years has been an interplay between the two basic philosophical approaches of Radical Reparations and Practical Reparations.62

These are broad labels that cover a multitude of related arguments. Nevertheless, they have some distinct defining features. On a basic definitional level, arguments which

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62 These terms have not been used in this sense in the legal literature. Some commenters have labeled portions of the discussion as “radical” in a more general sense. See Brophy, Pro & Con, supra note 1, at 71 (discussing Marable as a radical); at 34 (discussing Garvey as a radical); at 149 (discussing Harris as a radical). However, there has not been the systemic categorization into the radical and practical strands.
are antagonistic to or critical of the existing legal system, which are generally unwilling to operate within the existing legal or political systems, and which seek to bring about major systemic social changes are those which I call radical reparations. As Brophy notes, some advocates “seek a whole new system that radically redistributes property and therefore economic and political power.”63 For radical activists, reparations itself may be a peripheral goal or primarily a lens through which to make their larger critique. Brophy notes that reparationsist Manning Marable “is seeking to reform the entire society. . . . for him, reparations talk is a vehicle for advocating those changes.”64 In contrast, proposals focused on working within existing legal systems (judicial, legislative, or both) to obtain concrete gains (such as specific compensation for victims) are those which I will call Practical Reparations.65 The basic dichotomies that distinguish the two basic types of arguments can be shown in a simple table:

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<tr>
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<th>Radical Reparations arguments</th>
<th>Practical Reparations arguments</th>
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<tr>
<td>Relationship to existing legal and political structures</td>
<td>Antagonistic; seeks to change or undermine those structures rather than working within them.</td>
<td>Co-operative; seeks to work within existing power structures to achieve results.</td>
</tr>
<tr>
<td>Ultimate goals</td>
<td>Major changes, such as restructuring of society.</td>
<td>Specific gains (such as monetary compensation) within the existing system.</td>
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63 Brophy, Pro & Con, supra note 1, at 103.
64 Id. at 236 n. 63.
65 Let me make clear that, in using these labels, I am not intending to imply any criticism of either branch. In particular, this is not intended to criticize Radical Reparations with any implication of impracticability. Radical Reparations proposals can be practical in a general sense, as we will see. However, practicality is not their primary focus. They focus on making a radical critique of society. On the flip side, practicality is a primary concern of Practical Reparations. Thus, these labels are meant to be descriptive and to highlight the main focus of each branch, not to imply any value judgment about the worth of one branch or another.
Of course, there is often a good deal of overlap between these categories. They are not a strict dichotomy. Rather, they are opposite poles on a spectrum, and many points lie on the continuum between the two poles. A reparations advocate may make practical arguments at some points in time and radical arguments at other points. An advocate’s proposals may include a mix of the two. But ultimately, it is often possible to classify arguments as falling primarily into one of the two categories.

Practical arguments tend to stress the possibility of compromise. The Practical approach focuses on finding a way to make reparations palatable to majorities – no mean feat. Practical reparationists recognize the difficulty in presenting these arguments to unsympathetic majorities, who will be naturally skeptical because of factors like interest convergence. Practical reparations arguments are thus focused on compromise and attainability.

On the other hand, radical approaches to reparations focus on illuminating underlying societal problems. Compromise is not important here, and in fact the need to compromise in order to achieve any success may be one of the problems which radical reparations arguments seek to illuminate.

Both strands of reparations argument serve valuable purposes. Radical arguments keep the spotlight on broad societal injustice. This is a vital function which cannot be forgotten. At the same time, practical arguments keep a connection to reality, and help maintain hopes for ultimate compensation. The two strands work best when they reinforce each other, rather than oppose each other.67

66 See infra notes 227-29 and accompanying text (discussing interest convergence).
67 Cf. Matsuda, supra note 47, at 352-53 (discussing how liberal and critical branches can reinforce and support each other).
1. *Relation to other theoretical distinctions*

This radical / practical divide can be compared with some other categories for classifying approaches to reparations. There is some overlap in many existing frameworks, but none fully mirrors the practical/radical divide.

For instance, the practical/radical divide is not the same as the difference between a political and a moral approach to reparations, a distinction which some scholars have suggested in other contexts. It is true that practical approaches often focus on the political necessity of compromise. However, radical approaches can be advanced as political arguments, as activist James Forman demonstrates, while practical reparations may draw support from moral arguments, as is shown in the work of Roy Brooks. Thus, the practical / radical divide is not simply a restatement of the political / moral divide.

Nor is the practical / radical divide simply a restatement of the forward versus backward looking distinction. Neither Practical nor Radical approaches need be intrinsically forward or backward looking. Some instances of practical reparations focus on lawsuits, and so are backward looking, and some well-known instances of Radical

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69 See infra notes 32-38 and accompanying text (discussing James Forman).

70 See infra notes 259-263 and accompanying text (discussing Brooks’ approach).

71 See infra Part III (discussing reparations lawsuits).
Reparations have been forward-looking. However, it is possible to make backward-looking radical arguments, or forward-looking practical arguments.

The practical/radical divide is related to, but not the same as, the difference between corrective and distributive justice. Reparations arguments have used distributive or corrective ideas at different times. Distributive justice, with its emphasis on wealth redistribution to the less fortunate, is clearly more radical in scope. Thus distributive justice proposals will probably (but perhaps not always) be radical in nature. These ideas do not fit well within the tort system, which is mainly a corrective justice system; instead such remedies must be legislated. In contrast, a corrective justice approach – such as a tort lawsuit for harms suffered by Blacks—seems more practical.

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72 Some early land redistributions proposals were explicitly forward-looking in nature, intended to advance the economic position of Blacks going forward. Brophy, Pro & Con, supra note 1, at 26.
73 Id. at 74 (discussing corrective and distributive justice goals of reparations); see generally Katrina Miriam Wyman, Is There a Moral Justification for Redressing Historical Injustices?, 61 Vand. L. Rev. 127, 179-92 (discussing corrective and distributive justice rationales).
74 See Keith N. Hylton, A Framework for Reparations Claims, 24 B.C. Third World L.J. 31, 32 (2004) (noting “two distinct and in some ways conflicting policies behind reparations litigation. One approach is driven in large part by social welfare and distributional goals. The other approach is based on a desire to correct historical injustices; simply to ‘do justice.’”). One interesting aspect of reparations lawsuits is their use of the tools of corrective justice, the tort system, to try to create the pressure to ultimately lead to a remedy from the legislature, which would be a distributive justice remedy.
75 See Brophy, Pro & Con, supra note 1, at 33 (“At the heart of the FleetBoston [reparations] suit is a belief that reparations litigation will compensate or correct for years and years of inattention, or insufficient attention, to the welfare of African Americans.”). This is similar to the redistributive goal of the tobacco class action litigation. Id.; see also Calvin Massey, Some Thoughts on the Law and Politics of Reparations for Slavery, 24 B.C. Third World L.J. 157, 158-67 (2004) (discussing the two different approaches).
77 Forde-Mazrui, supra note 76, at 685, 707-09; Lyons, supra note 76.
However, corrective proposals may be either radical in nature, or more practical. For instance, Forman’s radical proposals were partly framed in corrective language.

The Practical versus Radical distinction is related to, but not identical to, the divide between critical and liberal approaches to law. The relation of both critical and liberal approaches to law has been discussed in various reparations articles. Critical approaches tend to be radical in nature, while liberal approaches to civil rights are often (but not always) more practical. Liberal approaches to law often show confidence in the legitimacy of existing laws, while critical approaches distrust the system and see ingrained racism and other structural problems. Thus, there are definite similarities between the frameworks. However, the Practical and Radical labels capture something different about the reparations discussion, which is not entirely reflected in the critical and liberal labels. The Practical and Radical labels relate to the rhetoric and argument framing, not the writer’s overall theory of law. For instance, one could have a critical approach to law in general, and make reparations arguments in the context of a critical analysis of law and of racial justice issues generally, but nonetheless adopt a Practical Reparations argument in the reparations context, for strategic reasons, such as in order to pursue more realistic payment options.

78 See Matsuda, supra note 47, at 341 (discussing the different approaches, and the benefits of each).
80 Several scholars whose views are critical on the whole have nonetheless adopted pragmatic Practical Reparations arguments.
Similarly, the practical / radical divide does not map perfectly onto the divide between nationalist and integrationist views in Black politics. Nationalist ideas are almost certainly radical in nature. However, radical reparations proposals need not be nationalist in nature; they can be integrationist in tone, while still seeking broader changes in society.

Thus, the Radical versus Practical divide in framing reparations is a new distinction which has not previously been analyzed. The distinction relates not to the underlying theory, but on the goals and methods of advocacy. In doing so, it allows us to better analyze the history of reparations dialog. I am not suggesting that the radical-practical divide is the most important divide in this area, or that it supplants other frameworks. This distinction is most useful in conjunction with other frameworks. What this framework offers is insight into important trends in the discussion.

It is striking the extent to which reparations discussions over the past century fit into one or the other of these categories – and correspondingly, the extent to which the discourse has tended to be dominated by one school or the other.

2. Practical and Radical Reparations from 1865 to 2000

With the practical.radical framework now set out, we can see how each approach has been dominant at times. The earliest proposals for pensions or land, within the first few decades after slavery, blur the lines the most. They tended to be both radical and practical. They were practical in the sense that they sought concrete payments or restitution, and worked within the legal system. They were radical, though, because at

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81 See Magee, supra note 9, at 868 (discussing nationalist versus integrationist approaches to civil rights).
the time, even those limited steps were a major societal upheaval. In addition, these proposals were sometimes justified with radical rhetoric. 82

Fifty years after the Civil War, reparations dialog entered a lengthy period of domination by more radical ideas. Marcus Garvey’s proposals for repatriation were quite radical, for instance. His criticism of America and suggestions for universal African citizenship also showed a deep discontent with existing power structures. 83 This was an entirely understandable approach. Early Reconstruction hopes for racial equality had been dashed by the Compromise of 1877 and the rise of Jim Crow. 84 Garvey’s radicalism showed Black frustration with the unfilled promises of Reconstruction.

Reparations discourse during the Black Power era remained radical in its goals. Advocates like James Forman were seeking wholesale societal change. Radical reparations advocacy was about much more than seeking money. The purpose of radical reparations advocacy was again to challenge the legitimacy of the system. Radical writers tended to focus on reparations as an illustration of the inherent injustices in the legal system, or as an abstract goal. These advocates were short on concrete proposals that might work in the existing society, and long on proposals for wholesale overhaul of law, society, or both. Radical ideas dominated the era. One byproduct of this radicalization was widespread public skepticism towards reparations. As Elazar Barkan

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82 Sen. Stevens argued that land redistribution was necessary because “the whole fabric of Southern society must be changed.” Brophy, Pro & Con, supra note 1, at 27.
notes, reparations proposals during this time were “rarely, if ever, taken seriously in public debates” and instead lived in a sort of “political fantasy land.”

Boris Bittker’s book *The Case for Black Reparations* is the exception which illustrates the rule. Bittker’s analysis was an extremely practical legal discussion, and explicitly framed as such. Bittker argued that “far from being a bizarre, outrageous, and unprecedented proposal” reparations was “susceptible to ordinary legal analysis.” But Bittker was criticized precisely because of his attempt to distance reparations from their radical root. “Perhaps only lay advocates of Black reparations will recognize the value of the ‘bizarre’ and ‘outrageous’ character of James Forman’s manifesto for attracting attention and provoking controversy that can have positive as well as negative effects,” wrote Derrick Bell.

The dialogue shifted during the 1980s, as legal writers began to examine and flesh out the legal case for reparations. Mari Matsuda’s 1987 article rekindled interest in legal analysis of reparations. Discussions remained relatively radical in their scope – as Matsuda notes, her proposal did not fit well within the existing legal system. While Matsuda’s article was radical in approach, it was nonetheless published in a law journal. This was a change from prior eras when very few serious discussions of reparations had appeared in law journals. This lacuna shows two things: first that radical reparationists were not using the medium of legal journals, and second that those journals did not

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86 See Bittker, *supra* note 42, at 68.
87 Bell, *supra* note 45 at 162.
consider reparations for slavery to be a serious legal topic. Rather, both parties seemed to see it as a topic for other forums; it was not related to law.

The subsequent law review articles by Magee and Verdun served as a bridge from radical towards more practical legal discussions about reparations. They were each radical in scope and conclusions, but introduced some more practical analysis. This is not surprising; Matsuda believed that the critical-liberal divide was overstated, and that the two views could support each other. Like Matsuda, both Verdun and Magee make some concessions to practical, rather than radical, approaches to reparations. While each ultimately approached the issue from the radical side, the stage was set for a broad-scale shift towards practical reparations. These articles remained radical in their general approaches, for instance neither article argued for reparations within the existing legal frameworks. While essentially Radical in tone, Magee’s article thus reflects some aspects of a Practical Reparations argument; Verdun’s article similar straddles the divide.

III. Post Millennial Reparations Rhetoric: The Rise and Fall of Reparations Lawsuits

A. Practical reparations and the rise of reparations lawsuits.

Just prior to 2000, a new kind of reparations discourse emerged as scholars made serious attempts to place reparations within the existing legal context. Over a period of

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89 Prior to 1990, there was only minimal discussion of the issue in the law reviews. See Magee, supra note 9, at 900 (noting that legal scholars have paid little attention to reparations). But see Bell, supra note 45; Hughes, supra note 42.

90 These discussions were certainly taking place in other forums, they were just not happening in law journals. See Walter Olson, Reparations R.I.P., City Journal (August 2008) at 1 (discussing reparations debates from the 1960s in the New York Review of Books and Harpers).

91 Matsuda, supra note 47, at 352-53.

92 Rhonda Magee divides between “mainstream” and “outsider” approaches to reparations. Magee, supra note 9.
several years, scholars including Al Brophy, Charles Ogletree, Robert Westley and others
developed a particular subset of Practical Reparations arguments – a legal reparations
narrative focused on developing legal support for tort or tort-like claims, made in a
group, against private companies who were involved in slavery.93

The genesis of modern reparations lawsuits comes from Robert Westley’s 1998
law review article Many Billions Gone.94 In this article, Westley argued that it was time
to “reconsider and revitalize the discussion of reparations” using concepts like tort to
address the harm of slavery.95 Westley’s article drew on both major strands of
reparations discussion. While Westley couched his article in radical language in many
places, he also made distinct moves towards a practical, lawsuit-driven approach. In
particular, Westley suggested “mapping a legal path to enforcement of Black
reparations.”96 Westley’s article focused on particular legal doctrines as actual goals, in a
way that had not previously been attempted.

Westley’s article led to extensive further discussion.97 Later articles focused on
specific goals and legal strategies for reparations.98 Scholars including Anthony Sebok,

93 There are other potential ways a reparations lawsuit could be framed. See Hylton, supra note
74, at 43 (“When thinking about reparations claims, one should avoid the mistake of viewing them as
monolithic, having the same difficulties in terms of identification of plaintiffs, causation, and
prescription of legal rights. In fact, reparations claims vary along many legal dimensions, creating a
rich array in terms of their consistency with settled law.”) See also Kaimipono David Wenger,
94 Robert Westley, Many Billions Gone, Is it Time to Reconsider the Case for Black
Reparations?, 40 B.C. L. Rev. 429 (1998). Lawsuits had been suggested before. As noted above,
Boris Bittker’s 1973 book was an important early argument for reparations. However, the idea did not
develop more substantially until Westley’s analysis.
95 Westley, supra note 94, at 432.
96 Id. at 433.
97 See Brophy, Pro & Con, supra note 1, at 67-69 (discussing impact of Westley’s article, noting
that it is “the single most important article in modern reparations theory” and that it “marked a key
turning point in the reparations debate”).
98 See Brophy, Pro & Con, supra note 1, at 97-140 (discussing the development of legal
arguments about reparations).
Eric Miller and others published law review articles about statutes of limitations, unjust enrichment, and other specific legal doctrines applied to reparations. By 2002, a symposium at NYU was examining discrete legal questions like statute of limitations and unjust enrichment. These articles were often the work of established legal scholars in other fields who had not previously written about reparations. The topic was a new focus for legal scholarship; as mentioned earlier, reparations had not previously been discussed at any length in legal academia. These articles tended to take a practical approach (although a significant minority of them included more radical elements). That is, they generally focused on framing reparations questions in legal terms, and discussed the possibility of legal remedies.

Alfred Brophy’s 2006 book *Reparations Pro & Con* represents the crystallization of, as well as the best primer for, the legal reparations narrative. Brophy sets out in detail the legal issues these lawsuits present, the types of claims brought, types of defendants, plaintiffs, damages, as well as the difference between tort and unjust

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101 There are too many post-millenial articles to list. Some articles which I would classify as Practical Reparations include the articles of Alfred Brophy, as well as Hylton, supra note 74; Miller, supra note 99; Keith Hylton, Slavery and Tort Law, 84 Boston University Law Review 1209 (2004); Wenger, Takings, *supra* note 93; Wenger, Rule of Law, *supra* note 79; and Sebok, *supra* note 98.


102 Even its title, Pro & Con, shows its place in the Practical Reparations tradition. Radical Reparations advocates have not been strongly concerned with addressing critics’ claims — that sort of analysis is the realm of Practical Reparations) which makes its especially ironic that *Pro & Con* was published precisely at the moment that reparations lawsuits failed.
enrichment claims. He discusses the questions of causation that arise in the reparations context, specific defenses like the statute of limitations, and specific rulings from courts in reparations litigation cases.

And of course the ultimate practical and lawsuit-based arguments about reparations in this era were made in lawsuits themselves. In 2002, Deadria Farmer-Paellman filed suit in federal court, seeking reparations from a variety of corporate defendants under theories of tort and unjust enrichment. In 2003, advocates filed suit in *Alexander v. Oklahoma*, seeking compensation for victims of the Tulsa riot.

**B. The Raison d’être of Reparations Lawsuits**

1. **Potential Benefits of Reparations Lawsuits**

Lawsuits played a specific role in reparations strategy, and offered important potential benefits. The major strategic benefit was potential recovery. Lawsuits offered a real chance at compensation, and the potential settlement for claims of harm against Black Americans was enormous – enough, advocates hoped, to invigorate and transform the Black community.

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103 Brophy, Pro & Con, *supra* note 1, at 97-117.
104 *Id.* at 100-102.
105 *Id.* at 102-03.
106 *Id.* at 121-33.

Earlier lawsuits had targeted government entities, though this had not been successful. See Wenger, Takings, *supra* note 93, at 248, 256-58 (discussing Cato case).
109 See Westley, *supra* note 94, at 467-76 (discussing the potential benefits of reparations).
Legal scholars offered an unusually good hook for believing that recovery was possible. The theory of group compensation changed significantly between 1987 and 2000. Over about a twenty-year period, several high-profile mass compensation groups were successful in seeking some form of compensation. In 1988, Americans of Japanese Ancestry were awarded compensation for internment in camps.\textsuperscript{111} The Japanese-American compensation began in part from litigation; and while the case itself failed, the increase public consciousness of the Japanese-Americans’ story – along with a congressional report – eventually led to legislation by Congress granting compensation.\textsuperscript{112} Similarly, Holocaust victim groups brought suit in the 1990’s seeking compensation for enslavement, human rights abuses, and unjust enrichment.\textsuperscript{113} After protracted litigation, a series of settlements provided various victims with some degree of restitution.\textsuperscript{114} Other large group compensation cases played out over the same time period, including tobacco litigation which eventually resulted in a massive settlement.\textsuperscript{115}

Discussion of reparations lawsuits explicitly built on these models; for instance, Robert Westley cited Japanese Americans and Holocaust victims as potential precedents.\textsuperscript{116} The focus was on practical remedies like mass restitution in a tort context.


\textsuperscript{112} Id.


\textsuperscript{114} Brophy, Pro & Con, \textit{supra} note 1, at 45-46.

\textsuperscript{115} Robert L. Rabin, A Sociolegal History of the Tobacco Tort Litigation, 44 Stan. L. Rev. 853, 874-75 (1992); Wenger, Causation, \textit{supra} note 107, at 306-16.

\textsuperscript{116} See Westley, \textit{supra} note 94, at 449-58. Al Brophy similarly notes:

“A second factor leading to the reinvigoration of talk about reparations for slavery and Jim Crow are the models of reparations that other groups--Native Americans, Holocaust victims, Japanese Americans interned during World War II, South Africans--have obtained. The form of reparations in
In one important article, Brophy set out the goal – later elaborated in Pro & Con – of “focus[ing] on the moral and legal case for reparations and how proposals made might actually work.”\textsuperscript{117}

Legal actions provided secondary benefits as well. They potentially opened the door for discovery, for instance. (In some mass restitution cases, such as the tobacco litigation, that power ultimately ended up being instrumental in providing the information that ultimately led to settlement.)\textsuperscript{118} In addition, information gleaned from the legal process could be used for storytelling and consciousness raising.\textsuperscript{119}

Reparations lawsuits also offered a vision of recovery framed as a distinct moral payout. In a legal action, government or private actors involved in slavery could be

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\textsuperscript{117} Brophy, Some Problems, supra note 116, at 497.

\textsuperscript{118} See Rabin, supra note 111.

\textsuperscript{119} See Brophy, supra note 1, at 145 (noting that disclosure leads to consciousness raising, which sets the stage for reparations). See generally Matsuda, supra note 47, at 359 (defining consciousness-raising). As Matsuda notes,

“Consciousness-raising in the feminist context is the collective discussion and consideration of the concrete, felt experience of gender in order to identify commonalities and build a theory of the cause, effect and means of eradication of sexist oppression. Consciousness-raising deliberately examines the detail of life in a gender-biased society. As method, it differs from the typical top-down, abstract method of male-dominated jurisprudential inquiry. The method can, however, respond to the same inquiries: what is law, how does it work, what can it be, what should it be? Consciousness-raising about race can include self-inquiry into one’s attitudes toward race, dialogue across racial lines, and inquiry into the life experiences of people of color.”
characterized as legally culpable wrongdoers. Reparations lawsuits offered a corrective framing of the question where plaintiffs could seek a form of vindication in court, an official judicial statement that they were harmed. This meant that there were moral and symbolic advantages to bringing a claim in court.

Lawsuit discussion altered the dialogue in important ways. In particular, it brought a new level of conceptual cohesion to the discussion. As noted earlier, prior reparations proposals had varied widely, ranging from pension proposals to Forman’s Manifesto to Garvey’s repatriation plans. Advocates have disagreed over many questions relating to remedies or recipients. Legal scholars like Brophy altered the discussion, with the details of legal claims providing a new unifying principle that limited the scope of advocacy.

Lawsuits also altered the discussion by providing a clear endpoint. This gave the possibility of closure, a concrete goal. This could be used to defuse critics who claimed that reparations was a never-ending process.

And so, over the last decade, within the confines of legal academia, the concept of reparations lawsuits gained some currency. Conferences and papers began to examine

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120 Cf. Robinson, supra note 59, at 370-74 (framing reparations as a question of debt).
121 There is an important symbolic value in taking a claim to court. See Magee, supra note 9, at 900, 905 (discussing the symbolic value of lawsuits). Even if a settlement did not admit fault, as in some mass restitution cases, the community could still view it as a moral victory, because refusals to admit legal fault are often viewed as illusory.
122 See, e.g., Charles Ogletree, From Brown to Tulsa: Defining Our Own Future, 47 Howard L.J. 499, 578 (2004) (suggesting that reparations would “not be divided equally” and would not be given to wealthy Blacks).
123 See Brophy, Pro & Con, supra note 1, at 176 (discussing the strategic need for an endpoint); see also Saul Levmore, Privatizing Reparations, 84 B.U. L. Rev. 1291, 1302 (2004) (discussing finality concerns); Charles Krauthammer, Reparations for Black Americans, Time 18, December 31, 1990 (suggesting that reparations would be an acceptable price for finality).
topics like the workings of the statute of limitations, unjust enrichment, mass torts, Indian law, takings and other discrete legal issues. A certain type of dialog emerged. As the lawsuits progressed, reparations talk became increasingly flavored with legal terminology. At the same time, more radical ideas on reparations became proportionally less a part of the discussion. That is, the emergence of Reparations lawsuits and the accompanying narrative fostered a new tone in the dialog and partially replaced the earlier diffuse, broad, radical approach to reparations with a newer focused, narrow, legal vision.

2. Reparations lawsuits in a multi-prong legal narrative

Reparations lawsuits were generally intended as part of a strategy including other components. This multi-pronged approach reflected the widespread perception that reparations were unlikely to be awarded outright at trial, but that nonetheless legal cases could play an important role. Many reparations advocates agreed that ultimately the most fruitful route would be legislative act or some sort of settlement. This reflected the fact that victories for other groups have typically come through settlement, not trial.

124 Miller, supra note 99.
125 Sebok, supra note 99.
126 Wenger, Causation, supra note 107.
128 Wenger, Takings, supra note 93.
130 Westley, supra note 94, at 436 (arguing that it is Congress, and possibly state legislatures, that must be persuaded to enact reparations); Brophy, Some Problems, supra note 116, at 534-39 (noting need for development of dialogue and scholarship to address the possibility of settlement); Miller, supra note 99, at 51-57 (suggesting that settlement is more likely to be successful than litigation); Wenger, Takings, supra note 93, at 256-58 (same).
131 These have included reparations for Holocaust victims and for Americans of Japanese Ancestry imprisoned during World War II. See Eric Posner & Adrian Vermeule, Reparations for
Brophy notes in *Pro & Con* that, “lawsuits look like a very difficult way of obtaining meaningful reparations. Individual lawsuits are simply not well honed to deal with claims by a group against descendants of a group of beneficiaries.”

He later sums up, “given the limitations of lawsuits, significant reparations are likely to come – if at all – through legislation.” This captures the conventional wisdom: Reparations, like most cases, was hoping to settle. That is, lawsuits might not have the direct legal effect of a judgment in court, but they have indirect legal effects (and direct financial effects) by encouraging settlement, either private or public.

The ultimate goal of advocates pushing reparations lawsuits was not to develop airtight legal arguments; it was to put the pieces in place for settlement. Other mass restitution cases involved settlements that were propelled in part by underlying lawsuits. A settlement did not depend on the ultimate success of lawsuits. New legal theories were helpful in securing reparations for Holocaust victims, but there was no one legal victory that provided a silver bullet – rather, a combination of publicity and changed


132 Brophy, *Pro & Con*, *supra* note 1, at 126.

133 *Id.* at 141. *See also id.* at xvi (same); *id.* at 133 (“given the difficulties for slave reparations lawsuits, it is unlikely that significant reparations will be achieved through the courts any time soon”); Wenger, Causation, *supra* note 107, at 305 (“Ultimately, however, reparations cases may not be best suited for success in court.”). Robert Westley notes, “legislatures provide a friendlier forum than courts.” Westley, *supra* note 94, at 435. Magee notes that it is likely that reparations would fail at the pleading stage, and are unlikely to succeed in court. Magee, *supra* note 9, at 900.


135 *Cf.* Rabin, *supra* note 115, at 874-75; Peter H. Schuck, Agent Orange on Trial (1986) (describing trial and resolution, including process of arriving at settlement); In Re Holocaust Victims Assets Litigation, 105 F. Supp. 2d 139 (E.D.N.Y. 2000) (approving settlement).
attitudes, as well as the possibility of legal liability, ultimately led to settlement.\textsuperscript{136}

Similarly, compensation for Japanese-American internees can without a necessary victory in a court of law. Though activists had gained valuable exposure and vindication through \textit{coram nobis} suits dismissing unjust prior convictions, all cases for restitution were dismissed.\textsuperscript{137}

Thus, besides legal argument, another key prong was political pressure.\textsuperscript{138} Any eventual settlement had to be palatable to the general populace.\textsuperscript{139} Indeed, civil rights history more broadly shows that legal success is not always a necessary step in changing views or reaching goals.\textsuperscript{140} In the case of restitution for Japanese-American internees, initial lawsuits seeking compensation were ineffective, but lobbying led to federal legislation creating a study commission to report on the events. That commission in turn

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\textsuperscript{136} See Sebok, supra note 99, at 1407-10.
\textsuperscript{137} Yamamoto, supra note 103, at 278-80. A \textit{coram nobis} suit is one which collaterally attacks a prior conviction based on error of fact. It is available in limited circumstances. Japanese-American detainees were successful in seeking \textit{coram nobis} relief. See also \textit{id}., at 319-40 (setting out the court’s \textit{coram nobis} opinion, as well as background).
\textsuperscript{138} See Yamamoto, supra note 111, at 479-82; 496-97 (discussing political element in reparations advocacy); Hylton, supra note 74, at 34 (“Proponents of . . . reparations claims believe that significant redistribution towards groups that make up America’s underclass will not be achieved through legislative action. Thus, reparations proponents have turned to the courts.”). See also Posner, supra note 123, at 709-11; Alfred Brophy, Reconsidering Reparations, 81 Ind. L.J. 811, 824-25 (2006).
\textsuperscript{139} Reparations advocates must bear in mind the interest convergence problem, as laid out by Derrick Bell — that Blacks are most likely to be politically successful when they can convince whites that their political interests are aligned. Derrick Bell, Brown v. Board of Education and the Interest-Convergence Dilemma, 93 Harv. L. Rev. 518 (1980); Brophy, Reconsidering Reparations, supra note 138, at 824-25 (discussing the political difficulties); Kevin Hopkins, Forgive U.S. Our Debts?, 89 Geo. L.J. 2531, 2539 (2001) (noting that any settlement will require support from white voters).
\textsuperscript{140} As Michael Klarman notes, there was very little legal change between \textit{Plessy} and \textit{Brown}; rather, the court in \textit{Brown} responded to changing social and political circumstances. Michael Klarman, From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality (2006). A similar point has been made by Mary Dudziak. See Mary L. Dudziak, Desegregation as a Cold War Imperative, 41 Stan. L. Rev. 61 (1988) (discussing how government began to support desegregation when this seemed necessary due to American foreign policy objectives). See also Mary L. Dudziak, The Little Rock Crisis and Foreign Affairs: Race, Resistance, and the Image of American Democracy, 70 S. Cal. L. Rev. 1641 (1997) (discussing how decisions about Little Rock were made with a view to their impact on foreign relations); Mary L. Dudziak, Brown as a Cold War Case, 91 J. Am. Hist. 1 (2004).
authored a highly public, official report in 1983 on the injustices of the detention. The report raised public consciousness, and eventually Congress acted on the political pressure and passed legislation granting restitution.\footnote{Yamamoto, \textit{supra} note 111, at 390.}

Moral arguments also played a role, as reparationists sought to “establish a moral principle that should be embodied in American law and perhaps a legal model for groups yet to be adequately compensated, such as Blacks.”\footnote{Westley, \textit{supra} note 94, at 437. \textit{See also} Massey, \textit{supra} note 75, at 157 (“When grappling with providing reparations for slavery, two distinct categories of issues emerge: legal and political.”); Miller, \textit{supra} note 99, at 50 (“Reparations, on this account, involves a demand for restoration of the ill-gotten gains of slavery to the group that was wronged. In so doing, it suggests both a legal strategy and an emotionally compelling moral argument. The legal strategy requires us to identify the various ways that blacks were harmed by whites who profited from slavery and then to sue for the repayment of those profits either to individuals or into some central fund for more general disbursement. The moral argument asserts that whites as a group were, and continue to be, responsible for the ills of the African American community. It is the power and simplicity of that moral claim that makes reparations at once so compelling an argument and so difficult for the vast majority of whites to endorse.”), cf. Yamamoto, \textit{supra} note 111, at 518 (“Those seeking reparations need to draw on the moral force of their claims (and not frame it legally out of existence) while simultaneously radically recasting reparations in a way that both materially benefits those harmed and generally furthers some larger interests of mainstream America.”).} Moral arguments would be a foundation for settlement; as Brophy noted, “the future of the movement undoubtedly will be determined in large part by our success in making a compelling moral argument for reparations that gains political support.”\footnote{Brophy, \textit{Some Problems}, \textit{supra} note 129, at 86.} And Rep. John Conyers repeatedly introduced a proposed House resolution to examine the effects of slavery – patterned on the successful use of such a commission for Japanese-Americans.\footnote{\textit{See}, \textit{e.g.}, Brophy, \textit{Pro & Con}, \textit{supra} note 1, at 3 (discussing how Conyers bill links to the reparations experience of Japanese-American internees).}

The overall strategic approach, then, went along these lines: Reparations lawsuits provided a legal arena to hear claims. They were not expected to succeed as lawsuits, but along with moral arguments, they would set the groundwork for settlement by legislative and political actors – just as in the case of Japanese-Americans and Holocaust victims.
This new legal narrative introduced new terms and new perspectives which altered the prior reparations dialog, making it less radical and more practical in specific ways.

C. Limits of the legal narrative

Framing reparations within a legal narrative was promising in some areas, but it also constrained and limited the dialog in important ways.

The most important limit of the legal narrative was its scope. The discussion followed the bounds of the projected lawsuits themselves, which depended on framing the harms of slavery in the technical legal language of tort or tort-like claims. So it focused attention on tort remedies; potentially broader types of remedies were not a central part of the narrative.\textsuperscript{145} The specific claims highlighted by reparations lawsuits were torts relating to slavery.\textsuperscript{146} The narrative also ended up including some other specific harms, such as harms from the Tulsa race riots, which could also fit under the tort umbrella. It could potentially include other similar harms, as long as they were tort or tort-like and sought concrete legal restitution remedies.\textsuperscript{147}

This framing conveyed certain messages. Tort law is the traditional arena for addressing private harms between individuals.\textsuperscript{148} Placing reparations claims in the sphere of tort sends a subtle message about how these claims should be perceived – as ultimately, private actions of harm. By placing the claims within the tort context, the

\textsuperscript{145} Broader remedies were regularly mentioned. However, they did not play a central role in the discussion.

\textsuperscript{146} Brophy, Pro & Con, supra note 1, at 104-06 (discussing the torts of slavery); id. at 23-26 (discussing lawsuits); Hylton, supra note 76, at 36-38.

\textsuperscript{147} Id. at 97-115 (discussing reparations lawsuits).

legal narrative effectively classified them as private harms, rather than (for instance) cases of state-sponsored oppression.\textsuperscript{149}

Because of its narrow tort focus, this narrative excluded many other types of claims for harm to Blacks, such as voter suppression,\textsuperscript{150} peonage and slave-like convict labor practices,\textsuperscript{151} segregation and cultural theft,\textsuperscript{152} educational inequity,\textsuperscript{153} many Jim Crow harms,\textsuperscript{154} violence and lynching,\textsuperscript{155} and broader societal racism in general.\textsuperscript{156}

\textsuperscript{149} Cf. Magee, supra note 9, at 899 (arguing that the current legal system legitimizes an inferior status for Blacks and conceals the ways in which that status is the product of oppression).

\textsuperscript{150} On voter suppression in general, see Gabriel J. Chin & Randy Wagner, The Tyranny of the Minority: Jim Crow and the Counter-Majoritarian Difficulty, 43 Harv. C.R.-C.L. L. Rev. 65, 87-94 (2008) (giving history of disenfranchisement of Black voters in the South even in majority areas); id. at 112 (“In violation of the letter and spirit of the Constitution, African Americans were denied the opportunity to control or significantly influence Southern governments following the Civil War. That injury violated the democratic principles that the U.S. Constitution established.”).


\textsuperscript{154} Gabriel J. Chin, Jim Crow’s Long Goodbye, 21 Const. Comment. 107, 126 (2004) (“In large part because of Jim Crow’s gradual rather than abrupt decline, even at the level of formal, written law there was never a systematic, sustained effort to identify the scope of racial discrimination and eliminate all of its manifestations.”) Incredibly, a large number of Jim Crow-era segregation laws remain on the books in Southern states. Though these laws are not enforced, their continued existence is troubling. Some attempts to remove them from legal codes have succeeded, but others have not. See Gabriel J. Chin et al., Still on the Books: Jim Crow and Segregation Laws Fifty Years After Brown v. Board of Education, 2006 Mich. St. L. Rev. 457 (cataloguing Jim Crow segregation laws that remained on the books as of 2004, as well as the mixed results of reports to state legislatures about those laws).

The Tulsa race riot could be considered a Jim Crow case, See, e.g., Brophy, Pro & Con, supra note 1, at 128 (describing Tulsa as a Jim Crow case). But much of Jim Crow involved actions less tort-like, and therefore not as good a fit in the reparations narrative.

Cf. Lyons, supra note 76, at 1385-97 (post-Civil War acts).
These omissions meant that this narrative would leave largely unaddressed some areas of major racial disparity and harm. For instance, housing segregation is linked to the same underlying racist motives as slavery and Jim Crow, and has had similar deleterious effects on Blacks. But those kinds of broad, non-tort claims were not included in reparations litigation, and so were downplayed in the post-millennial reparations dialog.

By failing to include certain types of claims, this narrative may have inadvertently implied that those claims lacked the same moral heft as the legally cognizable claims. It gave a particular privileged place to certain tort-like legal claims. While not an explicit statement about the worth of other claims, this may have created such an implication. Of course, slavery is the greatest harm that society has inflicted on Blacks. However, its current effects are entangled with other past racism, such that it is not clear that slave descent itself is more harmful to Blacks today than segregation, educational inequity, or other harms.

Even within the broadly tort-based structure there were strategic legal questions about which instances of tort-like harm to include in reparations lawsuits. Slavery offered the very strongest moral claims. But it was also uniquely subject to some legal defenses, given the passage of time, constitutionality of the institution, and other unique

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156 See Eric Miller, “Reparations Manifesto,” presentation at Thomas Jefferson School of Law, March 2006. See also Brooks, supra note 16, at 38-40, 201-04; Feagin, supra note 101; Wenger, Rule of Law, supra note 79.
157 Brophy, Pro & Con, supra note 1, at 108 (discussing questions of segregation).
158 Many Blacks who are not slave descendants suffer from contemporary racism.
159 See, e.g., Westley, supra note 94, at 465-66; Brophy, Pro & Con, supra note 1.
160 See Bell, supra note 45, at 162 (discussing the moral force of slavery claims).
vulnerabilities. Jim Crow harms did not carry the same moral weight as slavery, but they also did not suffer the same legal vulnerabilities. Thus, paradoxically, it was possible to argue that “the legal argument for reparations improves with exclusion of the slavery period” and that inclusion of slavery could be a “tactical loss” as a matter of legal strategy. This was troubling because slavery is the “emotional component that provides the moral language” for reparations.

In any case, the legal narrative that developed did not end with slavery, but also focused on later harms such as the Tulsa race riot as well. Tulsa was a compelling story, and offered some advantages. Less time had passed, and some of the victims were still living. The story was also intriguing and largely unknown. Tulsa seemed to present an excellent chance for reparations.

But the broader question remained of how to jointly address both Jim Crow and slavery. Of course, the two shared many features – Jim Crow continued slavery’s racism, and shared its place as a major moral wrong. But the legal differences were significant. Tulsa offered more attractive legal claims – such as living claimants – but the fact that Tulsa differed from slavery in each of those respects meant that advocates could not effectively package the two in a lawsuit. Instead, a separate lawsuit would need to focus solely on Tulsa. But this had a downside as well: A sole focus on Jim Crow harms

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161 See, e.g., Wenger, Takings, supra note 93, at 249-51 (discussing retroactivity); Wenger, Causation, supra note 107, at 302-06 (discussing unique attenuation problems in slavery reparations); Brophy, Pro & Con, supra note 1.
162 Bell, supra note 45, at 158.
163 Id.
164 See Brophy, Pro & Con, supra note 1, at 50-51, 128-33 (discussing Tulsa case).
165 Id. at 128; see also id. at 132 (“Tulsa is a strong case for reparations of some sort, through either the courts or the legislature. Indeed, four factors suggest Tulsa victims are owed reparations by the legislature: People are still alive, the incident was concentrated in time and place, government sponsored the harm, and promises were made to help rebuild.”)
166 As Brophy notes, “Tulsa is at once both compelling and limiting.” Id. at 132.
would strip advocates of some of their most compelling moral and emotional claims, those stemming from the “super-wrong” of slavery.\textsuperscript{167} The best legal options did not always track the best moral options – and this was just one area where moral and legal considerations diverged.\textsuperscript{168}

Another oddity of the legal narrative was its potential colorblindness. Of course, race played a role in that slavery was the underlying action. But the analysis of legal topics like statute of limitations was done on a purely legal level. One could imagine a hypothetical problem not involving race, where similar analysis would apply. It could be any large mass tort case. Because the lawsuit approach was based on legal claims, reparations could be a merely legal issue, no longer necessarily tied to racism or racial justice. Reparations lawsuits could operate independent of the victims’ Blackness.

This contrasts sharply with the earlier often radical and racial approaches. For instance, Matsuda’s 1987 article focused mainly on making an explicitly critical argument about race, class, and power, and used reparations as an illustration to argue that race and class issues created an existing system that was unjust because it failed to redress harm to the powerless.\textsuperscript{169} In contrast, the tort approach focused on the legal claims themselves. As a result, the dialog necessarily shifted, with a less prominent discussion of Blackness, and potentially less morally satisfying in that regard.

\textsuperscript{167} Magee, \textit{supra} note 9, at 902; \textit{see also} Bell, \textit{supra} note 45, at 162 (discussing the pragmatic approach of Jim Crow reparations versus the possibility of morally superior reparations claims based on the larger moral wrong of slavery, and arguing that advocates should avoid inadvertently de-emphasizing powerful moral arguments in the name of pragmatism).

\textsuperscript{168} Reparationists also disagreed on the appropriateness of some legally strong but morally limited doctrines like unjust enrichment. \textit{Compare} Sebok, \textit{supra} note 99, at 1440-42, \textit{with} Dagan, \textit{supra} note 107, at 1158-63. Unjust enrichment claims were included in the lawsuit. \textit{See} Wenger, Causation, \textit{supra} note 107, at 284-86.

\textsuperscript{169} Matsuda, \textit{supra} note 47, at 348-53.
Largely because of its exclusions and limitations, the legal narrative was unsatisfying for some reparations advocates. It offered useful benefits, but was also limited or even impoverished in some important ways: It was colorblind in nature and bounded by quirky legal rules; it had narrow scope and uncertain connection to present claims; and it may have inadvertently de-emphasized some of the stronger arguments in favor of reparations. It was a compromise, a set of narrowly drawn legal reparations arguments which deliberately omitted some of the more radical ideas from the discussion. The new dialog was one which judicial and legislative actors might take more seriously, and as long as the possibility of recovery existed, other questions could be deferred.

D. The Failure of Reparations Lawsuits

Tort suits were not the first legal failure for reparations. Reparations claims had suffered an earlier blow when the Ninth Circuit dismissed the *Cato v. United States* lawsuit against government actors in 1995, partially on grounds of sovereign immunity. However, *Cato* predated the shift in mass restitution that occurred in the late 1990s, as innovative legal strategies and claims of unjust enrichment resulted in an eventual settlement and reparations for victims of the Holocaust.

The new lawsuits avoided the problem of sovereign immunity by targeting long-lived corporate entities. Many observers viewed the Tulsa suit as even more favorable,

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170 See, e.g., Jordan, *supra* note 155, at 559 (arguing that “an exclusive focus on slavery is misguided”).
171 Cf. Magee, *supra* note 9, at 875-76 (noting that reparations would create a redistribution of wealth).
172 *Cato v. United States*, 70 F.3d 1103 (9th Cir. 1995); *see also* Brophy, Pro & Con, *supra* note 1, at 121-23.
because it involved living victims and a recent government admission of culpability. One commenter suggested, “it may serve as a model of a new - and more legally successful - way to approach the question of reparations for slavery.” Between the Tulsa claims and the corporation claims, legal success seemed possible.

Alas, that dream was not to be. Corporate claims were consolidated into the district court for the Northern District of Illinois, which dismissed the consolidated claims in *In re Slave Descendants,* finding that they were barred by a variety of legal hurdles including standing and statutes of limitations. Despite academic criticism of that decision, it remained essentially unchanged, and the Court of Appeals for the Seventh Circuit affirmed the dismissal of the major claims. Tulsa claims failed as well: The *Alexander* case seeking compensation for Tulsa race riot victims was dismissed as barred under the statute of limitations, a holding affirmed on appeal, thus ending that litigation. Some important gains were made in the litigation, as will be noted below, but the compensation claims were dismissed entirely.

### E. Reasons the lawsuits failed


175 Anthony Sebok, “How a New and Potentially Successful Lawsuit Relating to a 1921 Race Riot in Tulsa May Change the Debate Over Reparations for African-Americans,” Findlaw, March 10, 2003, at http://writ.news.findlaw.com/sebok/20030310.html. See also Dewayne Wickham, Tulsa Case is Key Reparations Test, USA Today, March 24, 2003; Brophy, Pro & Con, supra note 1, at 128 (“Tulsa presented one of the best cases for a lawsuit for reparations for Jim Crow, precisely because it fits into a framework that the law is able to recognize.”); Miller, supra note 99, at 52.

176 Brophy, Pro & Con, supra note 1, at 124; Wenger, Causation, supra note 107.


178 In re African-American Slave Descendants Litigation, 471 F.3d 754 (7th Cir. 2006). One peripheral claim relating to fraud was not dismissed. Id. See also Farmer-Paellman v. Brown & Williamson Tobacco Corp., 128 S.Ct. 92 (Oct. 1, 2007) (denying certiorari).

179 Alexander v. Oklahoma, 382 F.3d 1206 (10th Cir. 2004). See Brophy, Pro & Con, supra note 1, at 131-32 (discussing the Alexander case).
The new generation of reparations lawsuits\textsuperscript{180} failed for a variety of reasons, including both specific legal concerns and larger structural problems. First, the courts viewed the causation questions raised by reparations cases as simply too complex to allow for legal liability. Reparations lawsuits created uniquely complex causation issues. In a prior article, I noted that the concerns involved \textit{victim attenuation} (the link between deceased slaves and present claimants), \textit{wrongdoer attenuation} (the link between slaveholders and current defendants), and \textit{act attenuation} (the link between harmful acts of slavery and any present injury). The presence of all three kinds of attenuation creates a particularly high hurdle, and no case involving such complex attenuation questions has ever succeeded, at either trial or settlement.\textsuperscript{181} Reparationists have long been aware of these concerns.\textsuperscript{182}

The problem was exacerbated by the specific composition of the plaintiff class in the Farmer-Paellman lawsuit, where plaintiffs were unable to show that they suffered harm traceable to the named defendants.\textsuperscript{183} The \textit{Slave Descendants} court relied chiefly

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\textsuperscript{180} See Verdun, \textit{supra} note 53, at 600 (writing that “the post Civil Liberties Act era beginning in 1989” was one of “five major waves of political activism that promoted reparations”). Reparations lawsuits and other proposals have existed in some form or other since before the Civil War. \textit{See supra} notes 8-21 and accompanying text (discussing very early reparations attempts).

\textsuperscript{181} Wenger, \textit{Causation}, \textit{supra} note 107, at 302. After examining the effects of each type of attenuation, I ultimately concluded that “it is not an overstatement to say that no case that suffered from all three kinds of attenuation has successfully proceeded to a successful resolution through trial or settlement. This is a dire diagnosis for reparations.” \textit{Id.} at 305.

\textsuperscript{182} Al Brophy notes that “Courts typically deal with claims by well-identified victims against well-identified wrongdoers. Reparations lawsuits are often a different type, setting a class of victims against a class of descendants of perpetrators, current beneficiaries of past injustice, and others. The lawsuits frequently pose a claim of a group, loosely identified by relation to those enslaved, against the entire society. Such claims are hard to put into a legal framework.” Brophy, \textit{Pro & Con}, \textit{supra} note 1, at 99. \textit{See also} Matsuda, \textit{supra} note 47, at 374-85; Brophy, \textit{Some Problems}, \textit{supra} note 116, at 502-05.

\textsuperscript{183} Brophy notes, “One wonders whether the lawsuit might be more viable if the class were people descended from the people who worked for (or were bought and sold or whose life was insured by) the defendant companies” in question. Brophy, \textit{Pro & Con}, \textit{supra} note 1, at 123. See also id. at 98 (writing that the \textit{Farmer-Paellman} suit was “a poorly conceived slavery reparations lawsuit”).
\end{footnotesize}
on this lack of connection in dismissing the lawsuit, writing that, “Plaintiffs cannot establish a personal injury sufficient to confer standing by merely alleging some genealogical relationship to African-Americans held in slavery over one-hundred, two-hundred, or three-hundred years ago.” Ultimately, the district court was unwilling to find liability where causation was this attenuated, and the appellate court agreed, writing that “this causal chain is too long and has too many weak links for a court to be able to find that the defendants' conduct harmed the plaintiffs at all, let alone in an amount that could be estimated without the wildest speculation.”

The statute of limitations was also a fatal barrier. On the face of it, claims for reparation are simply too late, and are therefore blocked by the statute of limitations. There are potential ways around the statute of limitations in some cases; as Brophy notes, courts could toll the statute, or legislators could pass legislation allowing a suit to go forward. Absent some affirmative step, however, statutes of limitation block the claim. The Slave Descendants court found these barriers fatal to the case, noting that:

Given that the institution of chattel slavery in the United States ended in 1865, Plaintiffs' century-old claims would have accrued by 1865 at the latest. The longest limitations period for any of Plaintiffs' century-old claims is five years, which would have run well over a century prior to the filing of the instant Complaint. If cognizable claims ever existed, those claims were owned by former slaves themselves, and became time-barred when the statutes of limitations expired in the nineteenth century. As such, Plaintiffs' century-old claims are barred by the statutes of limitations in every jurisdiction.

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184 Id. at 748, 751.
185 In re African-American Slave Descendants Litigation, 471 F.3d 754, 759 (7th Cir. 2006).
186 Brophy notes that “there would be serious problems” with statutes of limitation. Brophy, Pro & Con, supra note 1, at 126.
187 Id. at 126-27.
188 471 F.3d at 773.
Other legal hurdles also affected the recent lawsuits. The most significant of these was sovereign immunity. This had led to the earlier dismissal of *Cato*, and because of sovereign immunity, tort plaintiffs did not target government actors, instead bringing more conceptually murky suits against corporations. Absent this hurdle, reparations lawsuits would change dramatically.189

The broader, underlying problem is simply the limited scope of courts and the judicial system in general. Courts are designed to address certain types of claims. As Brophy notes, “U.S. courts are designed to handle only limited claims. These are claims by plaintiffs against other defendants for very well-identified harms. . . Plaintiffs must identify some legal right that has been violated by the defendant, and the ways that violation has led directly to harm to the plaintiff.”190 The rules tend to privilege claimants who fit will into existing social structure, not claimants “at the bottom” of the social ladder.191 Novel legal ideas did not fit well into this formula.192 And additional problems arise because slavery was legal at the time it occurred.193 Given the limits of the judicial system, and the limits of tort, unjust enrichment, and other potential bases for recovery, it is not surprising that reparations lawsuits failed. They were not a particularly good fit with the current legal system.194

189 See Brophy, Pro & Con, *supra* note 1, at 121-23 (discussing sovereign immunity); *see also* Wenger, Takings, *supra* note 92, at 248-49 (suggesting one way to avoid this barrier).

190 See Brophy, Pro & Con, *supra* note 1, at 98.

191 See generally Matsuda, *supra* note 47, at 374-98.

192 See Brophy, Pro & Con, *supra* note 1, at 108; *see also* Matsuda, *supra* note 47, at 374-85.


194 Ironically enough, the best reparations claims, from a legal perspective, were the very early claims. Those claims had a strong causal connection. However, they had no chance of success, due to widespread societal racism. *See infra* notes 8-21 and accompanying text (discussing very early reparations claims).
In addition, as a matter of trial strategy, it seems clear that this particular lawsuit was brought too soon. There was not sufficient extant evidence to link these particular plaintiffs and defendants.\textsuperscript{195} In the future, individual or group links (such as through statistical evidence) might be shown, but the evidence did not exist when the lawsuits were brought.\textsuperscript{196}

**IV. Reparations Discourse Following Lawsuit Failure**

\textit{A. The Collapse of the Post-Millennial Legal Reparations Narrative}

As noted earlier, a specific legal narrative arose in the past decade, built on the idea of lawsuits as a tool to help drive settlement. However, reparations lawsuits were not successful in advancing the reparations goals as set out in the legal narrative. They were not a method of direct reparation (though that was always a longshot). Nor were advocates able to use lawsuits to obtain discovery or other piggyback effects (as in the tobacco litigation). Nor did lawsuits lead to the desired secondary effect of a litigation-impelled settlement, through Congressional action or private company embarrassment, as was the case with tobacco, Holocaust victims, or Japanese-Americans. Finally, the existence of the lawsuits has not led to a shift in public opinion about large scale reparations. In short, the legal reparations narrative suffered a complete collapse.

The lawsuits did not only fail as a matter of law. For a variety of reasons, the broader legal narrative itself also failed. The major problem was the mismatch between the lawsuits and the strategic needs of the movement. The lawsuits were limited by legal doctrines which forced them to focus on an unusual set of defendants. Early lawsuits

\textsuperscript{195} \textit{See} \textit{Brophy, Pro & Con, supra note 1, at 108} (arguing that the consolidated case was brought prematurely, because there is not sufficient research to link plaintiffs and defendants).

\textsuperscript{196} \textit{Wenger, Causation, supra note 107, at 316-24} (discussing the possible future use of statistical evidence in reparations litigation but noting that this evidence does not yet exist).
against governments had been dismissed. The Slave Descendants lawsuit targeted private companies whose corporate forebears were involved in different aspects of the slave trade, such as transporting slaves. The focus on those defendants was problematic because of their relatively low moral culpability. Slavery involved many very morally culpable parties: The individual slave holders in antebellum America, who committed the majority of the torts alleged, as well as the state and federal governments that created and enforced the regime in the first place. However, neither of those potential defendant groups were possible legal targets. Individual slave owners were dead, their legal culpability dead with them, while governments were shielded by sovereign immunity. Meanwhile, the corporate actors targeted had inherited their predecessors’ debts as a matter of successor company law, but did not inherit obvious moral culpability for predecessor wrongs, and so the moral claims against them were less compelling. As Roy Brooks phrased it, the tort approach had a “moral deficiency.”

The lesser moral culpability of defendants would have been largely moot if legal claims had succeeded. But defendants’ legal culpability was also unclear, because of lack of causal links between plaintiffs and defendants. Thus, the lawsuits inhabited a

197 See id. at 121-23 (discussing Cato); Wenger, Takings, supra note 93, at 248, 256-8 (same).

198 Brophy, Pro & Con, supra note 1, at 123-25 (describing Slave Descendants lawsuit).

199 Wenger, Causation, supra note 107, at 296-301.

200 See Brophy, Pro & Con, supra note 1, at 123 (describing the corporate defendants); see also Wenger, Causation, supra note 107, at 322-23 (noting that corporate defendants do not comprise the majority of the slavery market); Olson, supra note 90, at 2 (noting that Wachovia absorbed 400 other entities over the years, including a small number with ties to slavery); Alfreda Robinson, Corporate Social Responsibility and African American Reparations: Jubilee, 55 Rutgers L. Rev. 309, 338-42 (2003) (noting the links between slavery and corporate defendants).

201 This point is made by reparations critic Olson, supra note 90, at 2-3. See also Wenger, Causation, supra note 107, at 296-301 (discussing wrongdoer attenuation).

202 See Brooks, supra note 16, at 140.

203 See supra Part III.D (discussing the Slave Descendants court’s analysis). As noted above, some of these problems were the result of the lawsuit being brought too soon. Brophy, Pro & Con,
problematic no-man’s-land. They were bound by legal requirements which limited them to defendants of lesser moral culpability; yet they were not strong enough as legal claims to succeed in court. It was the worst of both worlds.

In part because of their reliance on muddled moral claims, the lawsuits were unable to follow the lead of prior precedents and shift public opinion as the legal narrative had contemplated.\textsuperscript{204} For instance, in the litigation regarding Japanese-Americans, lawsuits had served an important education purpose, and were able to help shape public opinion.\textsuperscript{205} But those lawsuits differed in important ways: They were directed at a target with clearer moral culpability; they relied on easier causal links; and they told a compelling new story.

Reparations lawsuits had a tougher path. They relied on a retelling of an older story, and they depended on more conceptually difficult links. The same causal attenuation which had undercut the lawsuit in court also undercut public acceptance of the reparations narrative. Slavery and race riot claims were morally compelling and offered clean-cut lines of wrongdoing, but advocates could not convince the public that corporate successors of antebellum railroad companies should foot the bill.

Showing the causal link is necessary, because the slavery story is \textit{old}, and Americans are convinced that they already know the facts. The post-millennial racial climate is a mixed bag for reparations advocates. On the one hand, there is widespread

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\textsuperscript{supra} note 1, at 124-25 (“Deadria Farmer-Paellman framed the lawsuit in a way that created problems . . . . A more credible suit would have located the descendants of slaves who worked for CSX’s predecessors or whose lives were insured by Aetna). \textit{See also} Wenger, Causation, \textit{supra} note 99, at 295-302 (discussing this concern)

\textsuperscript{204} \textit{See supra} Part III.B. (discussing the legal narrative and the role of lawsuits in changing public opinion).

\textsuperscript{205} \textit{See supra} notes 140-141 and accompanying text (discussing the role of lawsuits in shaping public opinion about Japanese Americans).
public acceptance of basic liberal antiracist ideals. The moral force of slavery claims in
the abstract is undisputed, with near-universal condemnation of overtly racist past acts.206
Opposition to reparations claims almost invariably conceded the initial harm.207

On the other hand, many Americans believe that the book is closed. They have
long-formed opinions about Blacks, and uninterested in hearing more about slavery.208 In
particular, as Roy Brooks notes, “Whites have an emotional interest in denying the fact
that an American institution as horrific as slavery could have lingering effects in twenty-
first century America.”209 The public has never accepted the idea that slavery links to
current harms, a skepticism which shows up repeatedly in media accounts.210 Modern
racism is nebulous and lacks the obvious torts that existed a century ago, and white
America is in denial about its effects.211 Polls show support for reparations at 5% among

206 This is widely recognized, even in objection to reparations. See, e.g., Magee, supra note 9, at
879 (citing objecting statement of Rep. Sessenbrenner which begins, “there’s no more detestable
institution than slavery, but . . .”). See also Magee, supra note 9, at 915 (noting that overt racism is
“deplored as anathema”).

207 The Slave Descendants opinion makes this clear. The opinion examines the history and
morality of slavery and is clear in its condemnation. 304 F.Supp.2d at 1034-38. The Court concludes
that “It is beyond debate that slavery has caused tremendous suffering and ineliminable scars
throughout our Nation’s history. However, Plaintiffs’ claims, as alleged in their Complaint, fail based
on numerous well-settled legal principles.” Id. at 1075. There are a few exceptions to this general
rule. See, e.g, David Horowitz, Uncivil Wars 70-83 (2003) (arguing that slavery benefited Blacks).

208 Cf. Brophy, Pro & Con, supra note 1, at 4-5 (discussing public attitudes towards reparations).

209 Brooks, supra note 16, at 150. On the general point, see, e.g., Taunya Lovell Banks,
Exploring White Resistance to Racial Reconciliation in the United States, 55 Rutgers L. Rev. 903,

210 One reporter describes the problem, noting that “Opponents say there is no precedent for
paying people who are dead, that reparations are usually awarded to survivors.” Kevin Merida, “Did
Long Time for the Answer,” The Washington Post, Nov. 23, 1999, at C-1. Another critic argues that
“it is obscene to think of this modern generation of black Americans profiting from the blood money
drawn nearly 140 years ago from the exploitation of slaves.” Juan Williams, Slavery Isn’t the Issue,

211 See generally Charles Lawrence, The Id, the Ego, and Equal Protection: Reckoning with
whites, less than any other political topic. Rejection by conservatives is probably to be expected, since the concept of reparations is deeply embedded in the “culture wars,” of political hot-button issues. More alarming is that the idea of reparations has failed to catch on among many moderates and progressives.

Hostility to reparations reflects the problem of interest convergence – that is, that “[t]he interest of blacks in achieving racial equality will be accommodated only when it converges with the interest of whites.” Because of interest convergence, Blacks are most likely to be politically successful when they can convince whites that their political interests are aligned. Similarly, reparations will only become feasible when white Americans believe that this is in their best interest – and low level racism may be sufficiently entrenched that reparations may be impossible.

The legal narrative sought to bridge this gap, but failed. Advocates used lawsuits to draw attention to continuing harm suffered by Blacks. However, the discussion did

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212 Brophy, Pro & Con, supra note 1, at 4-5. See also Alfred Brophy, The Cultural War over Reparations for Slavery, 53 DePaul L. Rev. 1181, 1182-85 (2004); Banks, supra note 209, at 915-19 (discussing demographics of Americans opposed to reparations); Michael Kranish, Blacks Rally on Capital for Slavery Reparations: Farrakhan Seeks Transfer of Land, Boston Globe, Aug. 18, 2002, at A3 (discussing findings from a CNN/USA Today/Gallup Poll). As Brophy notes, “Lest one think that Alabama is out of step with attitudes elsewhere in the United States, that racial gap is fairly constant. According to a study by Harvard University and University of Chicago researchers reported in the spring of 2003, only 4% of whites support reparations payments.” Id. at 4-5. See also Lee A. Harris, “Reparations” as a Dirty Word: The Norm Against Slavery Reparations, 33 U. Mem. L. Rev. 409, 410 n.9 (discussing these and other poll results).

213 See Brophy, supra note 212; Brophy, Pro & Con, supra note 1, at 86-92.


215 Bell, supra note 139; Brophy, Reconsidering, supra note 138, at 824-25.

216 Magee, supra note 9, at 910. Magee notes that “as long as whites continue to predominate in positions of power over Blacks within the system, they bring the subconscious belief in white supremacy to bear on the process,” and that “the court system and Congress can no more operate outside the American culture and its prevailing social relations than an individual can step outside of her own skin.” Id. See also Banks, supra note 209.

217 Brophy, Pro & Con, supra note 1, at 129 (discussing continuing violation arguments).
not convince the court. As previously noted, the lawsuits failed to show the necessary legal links between past harm and modern claims. The lawsuits were ineffective at altering existing skepticism or helping raise consciousness about links between slavery and current effects in the Black community. (Some level of consciousness-raising has happened with regards to the Tulsa race riot, but it has not been enough to galvanize support for reparations payments.) Even worse, the court’s own skeptical analysis then entered the discussion, and helped to reinforce the original anti-reparations criticism and skepticism. Advocates had inadvertently helped a new skeptical voice to enter the narrative – undercutting the broader public discussion as well, both the political side and potentially the moral side as well.\footnote{Lawsuit dismissal is not a moral act, so on the face of it, there is no moral statement. However, the extent to which legal and moral claims were intertwined may have resulted in public perception that the dismissal was also a rejection of moral claims.}

Instead of reinforcing the links between race and oppression, reparations lawsuits inadvertently de-emphasized the Blackness of the victims. In the lawsuit context, the race of claimants became largely irrelevant; the lawsuit would look more or less the same if similar actions had happened to any other group. In effect, reparations lawsuits adopted a standard of colorblindness. This allowed them to draw from legal precedents that did not involve Blacks, such as Holocaust victims, Japanese Americans, and even tobacco smokers.\footnote{\textit{See}, e.g., Wenger, \textit{Causation}, \textit{supra} note 107, at 285, 304-05 (discussing litigation precedents); Brophy, \textit{Pro & Con}, \textit{supra} note 1, at 45-46.} This may have been a reasonable compromise (especially given the law’s historic hostility to claims brought by Blacks) but the colorblind claim also failed.\footnote{Cf. Matsuda, \textit{supra} note 47, at 374-76 (discussing law’s hostility to claims from powerless classes.).} In addition, the colorblind approach undermined the victims’ moral claims. A
colorblind approach can address only overt racism, and does nothing to address the underlying racial hierarchy.\textsuperscript{221} The racialized harm of slavery can only be addressed by explicitly recognizing (and undermining) the links between race and oppression.\textsuperscript{222}

\textbf{B. Re-evaluating Reparations Narratives}

Lawsuit failure forced advocates to discard a model which, while intriguing, was flawed in important ways. This provides an opportunity to reassess both the perceived benefits and drawbacks of the legal reparations narrative, and to ask how various rhetorical approaches to reparations can advance the goals of the movement more broadly.\textsuperscript{223}

The rise and fall of the legal reparations narrative illustrates some of the limits of Practical Reparations approaches. It turns out that one can be too practical. The lawsuits carefully and painfully framed claims in legal terms in order to fit reparations into the tort model. Despite those compromises, courts were still unwilling to accept the idea of reparations. It may not be possible to shoehorn the racial justice questions of reparations into the narrow legal box of tort doctrine. Matsuda suggested that reparations were not

\begin{itemize}
  \item \textsuperscript{221} See, \textit{e.g.}, Neil Gotanda, A Critique of “Our Constitution Is Color-Blind,” 44 Stan. L. Rev. 1, 30 (1991) (arguing that the color-blind approach is internally inconsistent and is not helpful in protecting minority rights). Kimberle Crenshaw, Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, 101 Harv. L. Rev. 1331, 1384 (1988) (arguing that colorblindness perpetuates the white perspective as the underlying norm and does not address the problem of underlying hierarchy, and that that solutions for the problem of racial injustice must acknowledge the race consciousness that pervades the American psyche). This criticism is not universally accepted, and some advocates have championed a colorblind approach. See generally Rhonda Magee-Andrews, The Third Reconstruction: An Alternative to Race Consciousness and Colorblindness in Post-Slavery America, 54 Ala. L. Rev. 483, 487-89, 545 (2003) (suggesting that colorblind reconstruction based on “universal human dignity” rather than race); Magee, \textit{supra} note 9, at 898-900 (criticizing the colorblind approach).
  \item \textsuperscript{222} See, \textit{e.g.}, Robinson, \textit{supra} note 59, at 314-19, 327-30; see also supra notes 32-39 (discussing James Forman’s critique).
\end{itemize}
attainable in existing legal framework.\footnote{Matsuda, supra note 47, at 395-98.} Reparations lawsuits challenged that idea – but Matsuda was right, and tort law simply doesn’t fit.\footnote{Magee, supra note 9, at 914 ("despite clear evidence of injury . . . legal institutions fail to take responsibility").} This is more than simple rejection of one case; it’s also statement about the boundaries of the legal system. Courts aren’t designed to address damages without causation. The failure of reparations lawsuits shows the limits of law. Advocates cannot reasonably narrow their claims further without losing all substance. (And even if advocates stripped down their claims even further, it is not clear that they would prevail in court.) Tort lawsuits represented reparations at some of their most practical – and they were still insufficiently practical for the mainstream legal system. There are some injustices that law will not address.

In addition, the tort framework sapped some of the moral force of reparations claims. The most compelling feature of reparations claims is not that they are particularly well-situated as legal claims. Tort law separates real harm from legally cognizable harm, and allows some types of harm to be ignored by law.\footnote{Wenger, Causation, supra note 107; see also Matsuda, On Causation, 100 Colum. L. Rev. 2195, 2200-16 (2001).} By entering the legal arena, reparationists were bound by ill-fitting legal formalities that were not designed to help oppressed parties, but rather to maintain the powerful.\footnote{Matsuda, supra note 47, at 379. See also Patricia J. Williams, Alchemical Notes: Reconstructing Ideals From Deconstructed Rights, 22 Harv. C.R.-C.L.L.Rev. 401, 417-18 (1987); Peggy Davis, Law as Microagression, 98 Yale L.J.1559, 1568-71 (1989).} That system and its legal fictions allowed the Slave Descendants court to say, in the same breath, “slavery was terrible . . . sorry, no recovery.”\footnote{The Slave Descendants opinion reads: “It is beyond debate that slavery has caused tremendous suffering and ineliminable scars throughout our Nation’s history. However, Plaintiffs’
The failure of reparations lawsuits should not lead advocates to abandon the Practical Reparations strand entirely. As suggested earlier, both strands of reparations dialog can play important roles. It does suggest the need for a recalibration of sorts. The legal framing had many effects on the discussion, and some of these may be worth keeping.

Lawsuits provided cohesion for the movement. This was a mixed blessing. There are distinct advantages to the kind of focused and in-depth discussion that cohesion fostered. Reparations lawsuits also promised a clear endpoint. On the flip side, it's possible that the legal discussion streamlined conversations in a negative way as well, by directing energy into conceptual cul-de-sacs. Legal emphasis may have also been conclusory, effectively shutting down the possibility of broader dialog focused on more creative remedies. Finally, legal framing may have privileged particular adversarial conversations, and thus may have contributed to the highly charged nature of the discussions.

Without the possibility of legal recovery, there is no reason to hang on to the legal and conceptual cul-de-sacs and quirky rules of judicial doctrines that the lawsuit model imposed. These include lawsuits’ artificial focus on certain corporate entities and use of legal doctrines like unjust enrichment which lack moral force. If the master’s tools cannot be used to dismantle the master’s house, there is little use in keeping them around. Advocates should also reject the implied colorblind aspects of the lawsuit approach, instead re-racing reparations. Reparations lawsuits inadvertently sidelined the racial

claims, as alleged in their Complaint, fail based on numerous well-settled legal principles.” 304 F.Supp.2d at 1075.

Cf. Matsuda, supra note 47, at 352-53 (noting the use of both critical and liberal arguments).
nature of reparations, but without legal success – de-racing reparations for the proverbial mess of pottage.\[^{231}\] Slavery creates such a powerful moral claim precisely because of its racial nature.

On balance, it may be a good thing that the litigation failed. The demise of the lawsuit approach offers a chance to reevaluate, and potentially to open new paths forward.\[^{232}\]

V. Reparations, Rhetoric, and Revolution: Rebuilding Reparations Narratives

It is now certain that reparations will not follow the path of some other groups like Holocaust survivors and Japanese Americans, from lawsuit to eventual settlement. Reparations advocates will need to break new ground in order to succeed. But that is hardly unusual; each of the mass restitution groups cited as reparations examples broke new ground in one way or another. Admittedly, few had quite as high of barriers as reparationists now face. But all restitution claims have been difficult. Legal failure itself is a minor setback; lawsuits failed for other groups, like Japanese-Americans, who ultimately received restitution.\[^{233}\] The continuing gap in political progress is a bigger concern. The role of new reparations narratives will be to bridge that gap, altering public perception by making the moral case for reparations through new narratives. Reparations claims are strongest in the moral arena, not in the courtroom.

\[^{231}\] The Biblical Esau sold his valuable birthright to his brother for a meal. The phrase “a mess of pottage” has since meant the giving up of something valuable for an illusory benefit. See Genesis 25:29-34 (King James Version) (“And Esau came from the field, and he was faint: And Esau said to Jacob, Feed me, I pray thee, with that same red pottage; for I am faint . . . . And Jacob said, Sell me this day thy birthright . . . and he sold his birthright unto Jacob. Then Jacob gave Esau bread and pottage of lentils; and he did eat and drink, and rose up, and went his way.”).

\[^{232}\] Cf. Matsuda, supra note 47, at 382 (noting that there are benefits to a united front, but also benefits to having many different approaches).

\[^{233}\] Magee, supra note 9, at 904 (discussing failure of Hohri lawsuit for reparations for Japanese-Americans).
A. Renewing Radical Reparations

With the decline of the legal narrative comes a natural movement towards renewed radical reparations. Lawsuit failure strengthens and fuels radical arguments, which focus on inequities in existing power structures. The *Slave Descendants* decision was a setback for practical reparations, but a gain for radical reparations, because it further eroded Black trust in the legal system.\(^{234}\)

Radical resurgence is a necessary corrective. Reparation’s roots lie in revolution and radical challenge to racism. The legal narrative was too narrow, its discussion too cramped, and its remedies were too limited. The pendulum had swung too far.

Reviving radical reparations means that reparationists should “think big” and bring back the grandeur of radical reparations.\(^{235}\) Now that the artificial constraints of lawsuits are gone, reparationists should think creatively about ways to combat white privilege.\(^{236}\) Early civil rights cases involved sweeping equitable remedies and structural injunctions. Reparations could involve similar tactics; or reenergizing affirmative action; or even using tactics like tax law to fight inequity.\(^{237}\)

Re-radicalization carries its own risks. Reparations is an idea which, like many racial justice issues, is ahead of its times.\(^{238}\) Proponents of radical ideas must lay the groundwork if they want their views to gain broader acceptance.


\(^{235}\) See Brooks, Post-Atonement America, *supra* note 68, at 740 (urging advocates to think big).

\(^{236}\) For instance, Manning Marable has suggested that reparations is part of a movement for ending white privilege. Manning Marable, Along the Color Line: In Defense of Black Reparations, manningmarable.net, October 2002; *cf.* Brophy, Pro & Con, *supra* note 1, at 71-72 (discussing Marable’s argument).

\(^{237}\) For instance, tax rules severely penalize some racist institutions.

\(^{238}\) *Id.*
B. Radically Practical (or Practically Radical): Weaving the Strands Together

It will take the right balance to overcome the serious public hostility towards reparations. Both practical and radical sides are important. Radical Reparations arguments illustrate racial subordination, and energize the movement. But firebrands like Forman or Garvey were unable to achieve lasting political success, and similar radical proposals may not be politically palatable. If public opinion on reparations is to change, it will be through dialogues which also fit relatively well into existing social structures. Excessive practicality is also problematic, however. Too narrow of focus on practical arguments can strip reparations claims of their moral force. Reparations claims must remain connected to the racial roots of slavery. They must focus not on legal technicalities but on fundamental justice. Roy Brooks suggests an approach of “practical idealism.” “The ‘idealism’ in practical idealism helps to shape morally responsive reparations. The ‘practical’ in practical idealism narrowly tailors the reparation to the nature and scope of the antecedent atrocity.”

With the goals of balancing the strengths of both radical and practical approaches to reparations, we can suggest a few ideas for moving forward. This paper will not go into detail about each of these. However, it will suggest some approaches which balance the strengths of both reparations goals, and briefly examine the benefits they offer.

1. Storytelling

One promising approach is storytelling. Most Americans think (wrongly) that they already know everything there is to know about slavery, and about race issues generally. This perception can be challenged by storytelling which challenges the

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239 Brooks, Post-Atonement America, supra note 68, at 741.
popular consciousness. “Stories, parables, chronicles, and narratives are powerful ways for destroying mindset -- the bundle of presuppositions, received wisdoms, and shared understandings against a backdrop of which legal and political discourse takes place.”

Storytelling worked very effectively for Japanese-Americans. Eye-opening accounts of veterans and wrongful convictions caught the public attention. Slave reparations must take the same tack -- attacking myths such as the idea that slavery was limited to the South, that it cleanly ended in 1865, or that it was a minor part of United States history. The abysmally low numbers, such as the 5% polls, reflect in part a low public understanding of the breadth and effects of slavery. As Brooks notes, “when whites reject reparations on the grounds that they had nothing to do with slavery, they fail to understand the centrality of slavery in the socioeconomic development of this great country.”

Storytelling can educate the public about the widespread use of slavery outside of Southern plantations. Slavery was an economic foundation for the whole country, “not some Southern anomaly. We all inherit responsibility.” Storytelling illuminates the North’s ties to slavery, as well we the widespread use of slavery in industrial work like

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242 Advocates Quietly Push for Slavery Repayment, USA Today, July 9, 2006 (quoting white filmmaker Katrina Browne). As noted on Browne’s website, “Over the generations, the family owned 47 ships that transported thousands of Africans across the Middle Passage into slavery. They amassed an enormous fortune. By the end of his life, James DeWolf had been a U.S. Senator and was the second richest man in the United States. While they were one of only a few “slaving” families, the network of commercial activities that they were tied into involved an enormous portion of the Northern population. Many citizens, for example, would buy shares in slave ships in order to make a profit.” Id.
building and maintaining railroads. Storytelling combats the perception that slavery’s impact was limited and regional and that only a small number of Southern whites benefited from slavery. It can repeat the abolitionist refrain that slavery reflect an “unholy alliance . . . between the lords of the lash and lords of the loom” – slaveowners with Northern textile manufacturers. And it can raise consciousness about horrific and little-known massacre like Tulsa. As Roy Brooks suggests in *Atonement and Forgiveness*, storytelling “provides the factual foundation for apology.”

Storytelling blends both radical and practical elements. It is radical because it challenges prevailing ideas about race, in a way that gives voice to minority groups who have been excluded from the traditional legal framework and discussion. It is practical because it fits in existing legal structures. This is especially important, because of the limits that the law has placed on specific benefits to individuals. There is no constitutional limit on storytelling.

Storytelling can come from private or official actors. Official storytelling such as truth commissions can “lay the groundwork for a national consensus on reparations and

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243 Theodore Kornweibel, Jr., Reparations and Railroads, 29 T. Jefferson L. Rev. 219 (2007). As Kornweibel notes, plantation slaves were often rented out for railroad or other industrial labor. They were given difficult and dangerous work. Female slaves on railroads were expected to perform the same hard labor, but were also subject to sexual exploitation. Railroad work took a great toll on slave families, who were often broken up due to the demands of railroad labor. Kornweibel notes that in comparison to plantation work, “by every criterion, railroad slavery was worse.” Id. at 226.

244 For example, David Horowitz argues, “did a dirt-poor squatter in the Dakota territory circa 1860 really get some kind of psychological boost from the fact that Blacks were enslaved two thousand miles away?” David Horowitz, Uncivil Wars 81 (2003).

245 See David Herbert Donald, Charles Sumner and the Coming of the Civil War 140 (1960) (reprint 2009).


248 Cf. Brophy, Pro & Con, supra note 1 (discussing constitutionality of reparations).
also serve a cathartic purpose, which would offer emotional closure for victims.” The ultimate goal, after all, is not any particular legal victory. It is rebuilding the community. For instance, the state commission in Tulsa led to official storytelling and unprecedented acceptance of blame. The legal claims may have been dismissed, but the storytelling of the Tulsa report is a form of reparations itself. That is a reparations success story.

2. Microreparations

At the same time that public support in polls remains low, different varieties of localized reparations programs have become increasingly popular. The timing of these successes – just as the large lawsuits are failing – is significant, because it shows how they can draw from the consciousness-raising of the lawsuits. Brophy has charted the striking increase in these programs over the past ten years. The public distrust of broad-scale reparations has not harmed the popularity of microreparations, which are now a rare bright spots for reparationists. Microreparations blend the two strands of reparations – they are practical in their fit into existing law, but can have radical effects.

Microreparations ordinances may provide opportunity for additional storytelling or spotlighting. For instance, recent slavery ordinances may provide a platform for storytelling in the context of the law. These ordinances call for businesses to disclose past ties to slavery. Reparations advocates can use these as a platform by bringing

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249 Brophy, Some Problems, supra note 116, at 537; see also Brophy, Pro & Con, supra note 1, at 170 (discussing truth commissions).
250 See Miller, supra note 99, at 60-65 (discussing Tulsa).
251 See Kaimipono David Wenger, Towards Microreparations (draft, on file with author).
252 Brophy, Pro & Con, supra note 1, at 30-32. Surprisingly, Brophy gives this topic relatively little further analysis in Pro & Con. It is addressed briefly, but Brophy does not discuss microreparations in detail.
253 See Brophy, Pro & Con, supra note 1, at 50-52.
litigation or other actions to enforce them. They can place public attention on reparations without seeming self-serving, and can highlight the many lesser-known links to slavery.

Other sorts of rights may provide the context for storytelling and public consciousness-raising about slavery. For instance, Brophy has written recently about rights to access graveyards. This is an evocative image which may serve as a platform for storytelling and consciousness-raising. Many opportunities for microreparations remain. The St. Louis riot story is in some ways as compelling as Tulsa, and may be the next microreparations front.

Microreparations can build on an interact with intermediate steps like apology, affirmative action, commemorative events. Society already engages in periodic discussion of racial ideas, such as Black History Month and Martin Luther King day. Microreparations help to build on existing building blocks, and create a consciousness that can push back against reactionary ideas like framing affirmative action as a form of reverse discrimination.

3. Moral and restorative framing

One other area worth exploring is the variety of moral and restorative frameworks available for approaching reparations. One important framework is the concept of restorative justice, drawn from human rights law. Restorative justice is “focused on attempting to make the victim and society whole.” It “tends to be community-oriented,

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Brophy, Pro & Con, supra note 1, at 134 (discussing St. Louis).


aimed at restoring society through reconciliation” and “may take the form of truth commissions and symbolic gestures of atonement and forgiveness between victim and perpetrator.”

Another option is the moral approach of atonement suggested by Roy Brooks. The idea of atonement comes from the religious context, and signifies a reconciliation or setting straight of records. It also implies an expiatory act, an act designed to heal harms done in the past. As in the religious context, reparations involves a sacrifice designed to show contrition and to cleanse and make whole the community. The atonement approach is one of treating them as community members who are also harmed by the racism that is an ongoing legacy of slavery. Brooks writes that “atonement – apology and reparations – plus forgiveness leads to racial reconciliation.”

The idea of atonement can fit into existing law, but involves a radical re-envisioning of the moral framework of reparations.

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258 Keller, supra note 257, at 190. See also Magee, supra note 9, at 913 (arguing that reparations would have a powerful symbolic value, and that they would be “an extreme expression of official responsibility” but that because of that, they are particularly susceptible to majority attack). See also Keller, supra note 257, at 211 n.107, 217. See generally Carrie Menkel-Meadow, Restorative Justice: What is it and how does it Work?, 10 Am. Rev. L. Soc. Sci. 1 (2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1005485.

259 Brooks, supra note 16, at 143-47; 165-69. Brooks pointedly disavows the debt analogy espoused by advocates like Randall Robinson. Id. at 14, 138-43. See also Brophy, Pro & Con, supra note 1, at 73 (describing Brooks’ approach as one of moral reflection, not political confrontation).

260 Id. at 141.

261 Atonement is a religious term, typically used in Christian theology to represent the religious act of Jesus cleansing the sins of the world; more broadly, atonement is a form of moral cleansing and reconciliation. See Brooks, supra note 16.

262 See Wenger, Takings, supra note 93, at 241-44.

263 Brooks, supra note 16, at 143. See also id. at 148 (discussing reparations as a chance to clarify the historical record).
Ideas like storytelling, microreparations, and restorative or atonement approaches draw on both the Practical and Radical sides of reparations discourse. They blend well with the results-oriented focus of Practical Reparations, but they are also consciousness-raising tools and can be quite radical in their ultimate effects. Moving forward will ultimately require the best strengths of both practical and radical reparations.

Conclusion

The intellectual history of reparations argument shows the ways that advocates have framed the idea over time. These framings reflect changes in movement goals as well as changing perceptions of political realities. The interplay between radical and practical strands of reparations offers not only a fascinating history, but also a possible map for the future.