Journal of Civil Rights and Economic Development

Volume 25, Summer 2011, Issue 4 Article 5

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Kaimipono David Wenger

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(AND BACK AGAIN?):

REPARATIONS, RHETORIC, AND REVOLUTION

KAIMIPONO DAVID WENGER*

The story of reparations advocacy is a story of ideas. 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, and 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 both danger and 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 in the near future.[1] A lawsuit-propelled settlement, like those in the tobacco or Holocaust cases, is also now unlikely. Public support for reparations, particularly among non-Blacks,[2] remains alarmingly low, with some recent surveys placing white

* Associate Professor of Law, Thomas Jefferson Law School. Thanks to Al Brophy, Roy Brooks, Jack Chin, Karla Momberger, Eric Yamamoto, and participants in workshops at Thomas Jefferson School of Law, LaVerne Law School, and the Southern California Junior Professors Writing Group for excellent suggestions, both practical and radical. As always, any errors are mine. Thanks as always to my family for their cheer and support.

[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); CHARLES P. HENRY, LONG OVERDUE: THE POLITICS OF RACIAL REPARATIONS 20-26 (2007) (discussing reparations cases).

[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.").

support for reparations at a mind-boggling five percent.[3] Broad legislative responses are also unpromising. Rep. John Conyers, Jr. has introduced a bill to study the effects of slavery in every Congress since 1989, but it has never come to a vote.[4]

On the other hand, discussion of reparations remains at an all-time high, with new academic conferences and symposia proliferating.[5] 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 recently passed legislation requiring that insurance companies disclose their ties to slavery.[6] Similarly, ordinances passed in Chicago, Detroit, and Los Angeles, and other cities require that companies doing business with those cities disclose any connection to slavery.[7]

How does this mix of success and failure reflect the types of arguments used in the debate? This Article sets out an 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 main types of arguments- 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 strengthen the reparations movement by building on the strengths of both practical and radical approaches.

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

[3] *See* BROPHY, *supra* note 1, at 4-5 (exploring survey results). *Cf.* Lee A. Harris, *"Reparations" as a Dirty Word: The Norm Against Slavery Reparations*, 33 U. MEM. L. REV. 409, n.9 (2003) (discussing the lack of support for reparations among white Americans).

[4] *See* BROPHY, *supra* note 1, at 50, 191-97 (discussing the history of H.R. 40 and the text of the proposed bill); *see also* John Conyers, *Reparations: The Legislative Agenda*, 29 T. JEFFERSON L. REV. 151, 151 (2007) (same).

[5] *See, e.g., A Dream Deferred: Comparative and Practical Considerations for the Black Reparations Movement*, 58 N.Y.U. ANN. SURV. AM. L. 447 (2003).

[6] *See* BROPHY, *supra* note 1, at 32, 51, 199 (excerpting the California registry).

[7] *See id.* at 32, 51, 201 (setting forth the text of the Chicago ordinance).

reparations proposals actually predate the Civil War.[8] However, the first major wave of reparations discussion came immediately after the Civil War.[9] This wave included private attempts by freed slaves to receive compensation for their services,[10] as well as national calls for slavery compensation, especially in the form of land.[11] In particular, Radical Republican politicians like Thaddeus Stevens and Charles Sumner called for a massive land redistribution from Southern landowners to freed slaves.[12] These proposals echoed the suggestion of General William T. Sherman – put into practice for a brief period by the Union army – that freed slaves should receive "forty acres and a mule" from confiscated Confederate property, as well as surplus army animals.[13]

Each of these efforts was ultimately unsuccessful. General Sherman's field order was cancelled by President Johnson; the Radical Republican proposals failed in Congress; and restitution was transferred to the Freedmen's Bureau, which was limited in its authority and ultimately proved ineffective at achieving land redistribution.[14] Attempts to collect back wages through the Bureau also failed.[15] Only a few Blacks received land, and that was through race-neutral avenues like the Southern Homestead Act of 1866.[16]

[8] *See id.* at 20 (discussing antebellum proposals for slavery reparations); Adjoa A. Aiyetoro & Adrienne D. Davis, *Historic and Modern Social Movements for Reparations: The National Coalition of Blacks for Reparations in America (N'COBRA) and its Antecedents,* 16 Tex. Wesleyan L. Rev. 687, 693 (2010) (discussing calls for reparations dating as early as 1830).

[9] *See* Rhonda V. Magee, *The Master's Tools, From the Bottom Up: Responses to African-American Reparations Theory in Mainstream and Outsider Remedies Discourse*, 79 VA. L. REV. 863, 885-92 (1993) (describing Reconstruction-era proposals for reparations); *see also* BROPHY, *supra* note 1, at 20-23.

[10] *See* BROPHY, *supra* note 1, at 21-22 (giving the text of a remarkable letter from former slave Jourdoun Anderson to his former master, 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 886-88 (describing proposals of Stevens, Sumner, and others); *see also* BROPHY, *supra* note 1, at 26-27 (explaining Stevens' reasoning behind the proposal).

[13] *See* Magee, *supra* note 9, at 889-90 (noting General Rufus Saxton's plan, which sold 485,000 acres of land at low rates to about 40,000 former slaves); *see also* BROPHY, *supra* note 1, at 25, 183-85 (describing General Sherman's Field Order 15, which decreed that 400,000 acres of confiscated land along the Georgia coast be set aside for the exclusive use of freed slaves).

[14] *See* BROPHY, *supra* note 1, at 27 (noting that "the overwhelming response" in Congress to Radical Republican proposals for reparations "was one of opposition"); *see also* Magee, *supra* note 9, at 889 (describing the failure of reparations proposals).

[15] *See* Magee, *supra* note 9, at 890 (illustrating the failed efforts of Colonel Charles Bentzoni in Arkansas, and a Virginia Assistant Freedmen's Bureau Commissioner's failure to collect back wages for African-Americans illegally retained in slavery).

[16] *See* ROY BROOKS, ATONEMENT AND FORGIVENESS 8 (2004) (noting that "blacks received hundreds of thousands of acres in this way, but fewer black families received homestead land than the number of black families that would have received 'forty acres and a mule' under Special Field Order No. 15").

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

Fifty years after the Civil War, reparations dialogue 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.[22] Garvey untiringly promoted the idea of repatriation to Africa through his Universal Negro Improvement Association (UNIA).[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[and] courts of law. . .[25] [and] we believe in the inherent right of

17 *See id.* at 8-9 (listing various reasons why the bill failed to gain support).

18 *See* Aiyetoro & Davis, *supra* note 8, at 699-705 (giving the history of Callie House); *see also* BROOKS, *supra* note 16, at 9 (noting that proposals for ex-slave pensions never received the support of mainstream black civil rights organizations like the National Negro Business League or the NAACP).

19 *See* BROOKS, *supra* note 16, at 9 (commenting that the government "pursued, prosecuted, and convicted" these individuals on questionable charges).

20 *See id.* at 34 (discussing early attempts to receive pension payments or tax refunds from slave-raised cotton). *See generally* MARY FRANCES BERRY, MY FACE IS BLACK IS TRUE: CALLIE HOUSE AND THE STRUGGLE FOR EX-SLAVE REPARATIONS (2005) (giving the history of the movement for Black pensions).

21 *See* BROPHY, *supra* note 1, at 97-98 (discussing early lawsuits dismissed in the 1910s).

22 *See id.* at 34 (giving background on Marcus Garvey). *See generally* COLIN GRANT, NEGRO WITH A HAT: THE RISE AND FALL OF MARCUS GARVEY (2008) (providing the history of Marcus Garvey and the African repatriation movement).

23 *See generally* GRANT, supra note 22, at 53-55 (discussing the creation of the UNIA).

24 MARCUS GARVEY, SELECTED WRITINGS AND SPEECHES OF MARCUS GARVEY 16, 18 (Bob Blaisdell ed., 2004).

25 *Id.* at 18.

the Negro to possess himself of Africa."[26] Later, the Declaration read: "We hereby demand that the governments of the world recognize our leader [and give Blacks] complete control of our social institutions . . . . [W]e declare the League of Nations void."[27] Garvey followed this up with a series of related speeches over the next several years. The ultimate 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 represent[ed] the spirit, the feeling, and the attitude of every white man in the United States of America."[30] Garvey continued his political career until his untimely arrest and deportation.[31]

Through the 1960s and 1970s, the reparations movement abandoned Garvey's repatriation ideas, but remained tied to Black Power groups.[32] In 1969, activist James Forman made headlines when he demanded large payments from churches.[33] Forman's Black Manifesto reflected radical proposals for societal reconstruction.[34] The Manifesto stated, "[W]e shall liberate all the people in the United States, and we will be instrumental in the liberation of colored people the world around."[35] It advocated for "revolution, which will be an armed confrontation and long years of sustained guerilla warfare inside this country," and sought "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 the people."[36] The Manifesto contemplated a socialist society led by Blacks only; whites and members of other races had to "be willing to accept Black leadership."[37] In addition to

26 *Id.* at 19.

27 *Id.* at 21-22.

28 *Id.* at 72.

29 *Id.* at 73.

30 *Id.* at 75.

31 Other leaders sought to carry on Garvey's legacy. *See* Aiyetoro & Davis, *supra* note 8, at 705-09 (discussing the work of Queen Mother Audley Moore).

32 *See* BROPHY, *supra* note 1, at 37 (showing how, in the early 1960s, the modern reparation movement shifted from its original goal of integration to one of Black Power and autonomy).

33 *See id.* at 37 (discussing Forman's demands).

34 *See id.* at 37-38 (discussing some of Forman's radical proposals from the Black Manifesto); *see also* Aiyetoro & Davis, *supra* note 8, at 709-15 (discussing how Forman's demands fit into the history of reparations advocacy).

35 BLACK MANIFESTO: RELIGION, RACISM & REPARATIONS 116 (Robert S. Lecky & H. Elliott Wright eds., 1969).

36 *Id.* at 117.

37 *Id.* at 118 ("[W]e are dedicated to building a socialist society inside the United States where the total means of production and distribution are in the hands of the State, and that must be led by black people, by revolutionary blacks who are concerned about the total humanity of this world.").

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.[38] It also called on Blacks to "seize the offices, telephones, and printing apparatus" of white churches, as part of a targeted campaign of "total disruption."[39] Another radical group, the Republic of New Afrika, demanded that Blacks be given land in five Southern states, which would then be made into an independent Black nation.[40]

Martin Luther King spoke in favor of reparations as well, though less forcefully than other more radical activists. Dr. King wrote that "[n]o 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 suggested a "massive" settlement payment to represent compensation for stolen labor.[41] 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."[42]

Law professor Boris Bittker made a very different set of reparations arguments in his 1973 book *The Case for Black Reparations*, an important early attempt to understand reparations in legal terms.[43] Bittker carefully analyzed the potential claims for harms of slavery. He ultimately concluded that most types of reparations for slavery itself were not feasible.[44] Instead, Bittker suggested a focus on Jim Crow issues, especially

38 *Id.* at 120-21 (describing the reasons and plans for the money demanded).

39 *Id.* at 122.

40 *See* ELAZAR BARKAN, THE GUILT OF NATIONS 285-86 (2000) (discussing the Republic of New Afrika movement); Adam Clanton, *The Men Who Would Be King: Forgotten Challenges to U.S. Sovereignty*, 26 UCLA Pac. Basin L.J. 1, 23-27 (setting out the history and legal claims of the Republic of New Afrika and its members). Years later, activists from the Republic of New Afrika joined with other activists to create the umbrella advocacy group N'COBRA (the National Coalition of Blacks for Reparations in America) during the 1980s. *See* Adjoa A. Aiyetoro, *The Development of the Movement for Reparations for African Descendants*, 3 J. L. SOC'Y 133, 142-43 (2002). *See also id.* at 143 (discussing reparations support among other Black Power organizations such as the Nation of Islam); Aiyetoro & Davis, supra note 8, at 728-30 (discussing the history of N'COBRA).

41 *See* MARTIN LUTHER KING, JR., WHY WE CAN'T WAIT 150-51 (1964); *see also* Anthony Cook, *King and the Beloved Community: A Communitarian Defense of Black Reparations*, 68 GEO. WASH. L. REV. 959, 962 (2000) (discussing Dr. King's view of reparations in the context of social justice); BROPHY, *supra* note 1, at 224; David Boyle, *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").

42 Lee A. Harris, *Political Autonomy as a Form of Reparations to African-Americans*, 29 S.U. L. REV. 25, 37 (2001).

43 *See* BORIS BITTKER, THE CASE FOR BLACK REPARATIONS (1973); *see also* BROPHY, *supra* note 1, at 38-40 (discussing Bittker's role in the reparations debate.

44 *See* BITTKER, *supra* note 43, at 135-37 (noting that reparations claims would compete with nonracial welfare programs in seeking public money).

desegregation claims that might be brought under §1983.[45] However, his analysis was not widely accepted, and was criticized by radical scholars such as Derrick Bell.[46] Although he admired Bittker's project, Bell suggested that reparations proposals were effectively blocked by white self-interest.[47]

An important shift in the discussion took place in 1987, in an article by Mari Matsuda discussing reparations and causation.[48] Matsuda argued that law systematically undervalues the experience of the oppressed, using reparations as one illustration of that point.[49] 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 "suggesting new connections between victims and perpetrators."[50] Matsuda suggested that avoiding problems such as statutes of limitations and laches required "something other than a rigid conception of timeliness."[51] Her overall project was a criticism of existing legal theory and a proposal that law should "look to the bottom" and incorporate ideas from the oppressed.[52] Her goal was "the transformation of an unjust into a just world."[53] Matsuda's article opened the door to further legal discussions.

In 1993, two law reviews published articles on reparations.[54] Both focused on the political aspects of reparations. Rhonda Magee's article

45 *See id.* at 9-10; *see also* Magee, *supra* note 9, at 901-03 (discussing Bittker's analysis).

46 *See* Derrick Bell, *Dissection of a Dream*, 9 HARV. C.R-C.L. L. REV. 156, 162 (1974) (criticizing Bittker); *see also* Magee, *supra* note 9, at 903 (noting that Bittker was "ignored by racial theorists of his era").

47 *See* Bell, *supra* note 46, 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 *See* Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987). Brophy calls this article "the fountainhead of academic writing on reparations." BROPHY, *supra* note 1, at 278.

49 *See* Matsuda, *supra* note 48, at 324-41, 374-98 (arguing that the voice or viewpoint of the oppressed offers a valid normative source to the Critical Legal Studies movement, and that reparations, as a legal norm deriving from the oppressed, would be attractive to the movement).

50 *Id.* at 374.

51 *Id.* at 381.

52 *See id.* at 340-53, 398-99 (noting that the viewpoint of the oppressed may be a valid source of legal norms).

53 *Id.* at 353.

54 *See* Magee, *supra* note 9, at 866–67 (discussing the historical legal treatment of reparations for minority groups); *see also* Vincene Verdun, *If the Shoe Fits, Wear It: An Analysis of Reparations to African Americans*, 67 TUL. L. REV. 597, 600 (1993) (examining the issues related to reparations to African Americans).

adopted an explicitly critical approach.[55] She argued that the colorblind approach of the political system prevented it from addressing underlying problems of racial injustice.[56] Additionally, she argued that reparations for Blacks had been ignored because of white self-interest, driven by inherent racism in the political system,[57] and that an outsider perspective was needed to make reparations possible.[58] Vincene Verdun's article focused in particular on the idea of liability for racism, and on an approach of political strategy rather than legal claims.[59] Finally, in 2000, Randall Robinson's published *The Debt*.[60] Writing for a general audience, Robinson discussed the many demographic gaps between Blacks and whites in America, and tied those gaps 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.[61] Robinson's book was instrumental in helping to further popularize the topic of reparations.[62]

The history of reparations dialogue through the year 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 become radicalized, with claims for repatriation, large-scale property transfers, and other broad-based remedies. But during the 1980s and more so in the 1990s, the movement began to shift again, with legal scholars discussing specific legal remedies in law journals. This presaged an important shift that took place around 2000. Before looking at that shift, I will analyze some patterns and ideas from prior reparations dialogue.

55 *See* Magee, *supra* note 9, at 867 (stating that the article would examine the question from a consciously critical minority perspective).

56 *See id.* at 898–900 (positing that the colorblind approach justifies the conditions under which African Americans live as the consequence of their "individual incompetence or indolence" as opposed to racial oppression).

57 *See id.* at 908–11 (discussing how white control in the political arena will inevitably lead to continued racial subordination because whites have a continuing self-interest, whether they realize it or not).

58 *See id.* at 911–12 (suggesting that those who have experienced the "falsity of liberal promise" can provide a inspirational vision and thus assist critical scholars in reaching their goals of remedial action).

59 *See* Verdun, *supra* note 54, at 636–39 (arguing that with regard to slavery, society as a whole should be held liable because the list of wrongdoers covers such a vast spectrum).

60 RANDALL ROBINSON, THE DEBT (2000).

61 *See id.* at 107 (demanding that white society acknowledge its debt to slavery's contemporary victims and pay massive restitution).

62 *See, e.g.*, BROPHY, *supra* note 1, at 69–71 (noting the effects of Robinson's book on discussion about reparations).

II. PRACTICAL AND RADICAL APPROACHES TO REPARATIONS

In reviewing reparations history, it is clear that advocates have taken some very different approaches to the idea, framing their reparations goals quite differently at various points in time. Some reparations advocates promoted 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 other times. That is, reparations discourse over the past 150 years has been interplay between the two basic philosophical approaches of *Radical Reparations* and *Practical Reparations*.[63]

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 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 arguments. As Brophy notes, some advocates "seek a whole new system that radically redistributes property and therefore economic and political power."[64] For some radical activists, restitution itself may be a peripheral goal, or primarily a lens through which to make their larger critique.[65] For instance, Brophy notes that the late reparationist Manning Marable "is seeking to reform the entire society. . . . For him, reparations talk is a vehicle for advocating those changes."[66] 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 arguments.[67] The basic dichotomies

[63] These terms have not been used in this sense in the legal literature. Some commentators have labeled portions of the discussion as "radical" in a more general sense. *See, e.g., id.* at 34, 71, 149. Here, Brophy refers to advocates who think in grand terms and propose novel and extreme solutions. However, there has not been the systemic categorization into the radical and practical strands.

[64] *Id.* at 103.

[65] *Cf.* Aiyetoro & Davis, *supra* note 8, at 692 (noting that reparations can be "a lens into the Black struggle for liberation from slavery and its vestiges").

[66] *Id.* at 236 n.63.

[67] *Cf.* Aiyetoro & Davis, *supra* note 8, at 690 (noting that some reparations advocates have turned to legal proposals, while others reject courts as illegitimate).

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. Radical reparations proposals make a broad critique of society. On the flip side, practicality is a primary concern of practical reparations. Thus, these labels are meant to be

that distinguish the two types of arguments can be shown in a simple table:

	Radical Reparations arguments	*Practical Reparations* arguments
Relationship to existing legal and political structures	Antagonistic; seeks to change or undermine those structures rather than working within them.	Co-operative; seeks to work within existing power structures to achieve results.
Ultimate goals	Major changes, such as restructuring of society.	Specific gains (such as monetary compensation) within the existing system.

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. 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. Practical reparationists recognize the difficulty in presenting these arguments to unsympathetic majorities who will be naturally skeptical because of factors like interest convergence.[68] Practical reparations arguments are thus focused on compromise and attainability.

On the other hand, radical approaches to reparations focus on illuminating underlying structures of subordination. Compromise is not the goal, and in fact, the need to compromise in order to achieve any success may be further evidence of the subordination which advocates seek to illuminate.

Both strands of reparations discourse serve valuable purposes. Radical proposals keep the spotlight on issues of broad societal injustice, while practical proposals preserve hope for ultimate compensation. The two strands work best when they reinforce each other.[69]

descriptive and to highlight the main focus of each branch, not to imply any value judgment about the worth of one branch or another.

[68] *See infra* notes 227-29 and accompanying text (discussing interest convergence).

[69] *Cf.* Matsuda, *supra* note 48, at 352-53 (explaining how liberal and critical branches can reinforce and support each other).

A. 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 mirror 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.[70] 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,[71] while practical reparations may draw support from moral arguments, as is shown in the work of Roy Brooks.[72] 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 thus are backward-looking,[73] while some well-known instances of radical reparations have been forward-looking.[74] However, it is also possible to make backward-looking radical arguments, as well as forward-looking practical arguments.

The practical/radical divide is related to, but not the same as, the difference between corrective and distributive justice.[75] Reparations arguments have used distributive or corrective ideas at different times.[76] Distributive justice, with its emphasis on wealth redistribution to the less fortunate, is clearly more radical in scope.[77] Thus, distributive justice

70 *See* Roy Brooks, *Toward a Post-Atonement America: The Supreme Court's Atonement for Slavery and Jim Crow*, 57 U. KAN. L. REV. 739, 740 (2009) (exploring political and moral approaches); *cf.* BROPHY, *supra* note 1, at 73-74 (discussing Brooks' approach as moral rather than political).

71 *See infra* notes 33-39 and accompanying text (discussing James Forman).

72 *See infra* notes 260-265 and accompanying text (exploring Brooks' approach).

73 *See infra* Part III (discussing reparations lawsuits).

74 BROPHY, *supra* note 1, at 26. Some early land redistribution proposals were explicitly forward-looking in nature, intended to advance the future economic position of Blacks.

75 *See id.* at 74 (noting 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 (analyzing corrective and distributive justice rationales).

76 *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 [while] the other is based on a desire to correct historical injustices).

77 *See* BROPHY, *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."); *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

proposals will probably, though 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.[78] In contrast, a corrective justice approach – such as a tort lawsuit for harms suffered by Blacks—seems more practical.[79] On the other hand, however, 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.[80] 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.[81] While there are definite similarities between the frameworks, the practical and radical labels capture something different about the reparations discussion that is not entirely reflected in the critical and liberal labels. The practical and radical labels relate to 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 make a practical reparations argument for strategic reasons, such as pursuing a more realistic payment options.[82]

Similarly, the practical/radical divide does not perfectly map onto the divide between various views on Black politics including nationalist, integrationist, and separationist.[83] There are likely to be some correlations; for instance, nationalist ideas are almost certainly radical in nature. However, radical reparations proposals need not be nationalist in nature;

two different approaches).

78 *See* David Lyons, *Corrective Justice, Equal Opportunity, and the Legacy of Slavery and Jim Crow*, 84 B.U. L. REV. 1375, 1375-78 (2004) (calling for legislative policies to rectify racial inequities); *see also* Kim Forde-Mazrui, *Taking Conservatives Seriously: A Moral Justification for Affirmative Action and Reparations*, 92 CAL. L. REV. 683, 707-08 (2004) (arguing for corrective justice as practiced by all of society through a collective approach). *Cf.* Richard Epstein, *The Case Against Black Reparations*, 84 B.U. L. REV. 1177, 1186 (2004) (noting that a legislative initiative doesn't require corrective justice, but simply enough votes to pass).

79 *See* Forde-Mazrui, *supra* note 78, at 685, 707 (noting the history of corrective justice within American criminal and tort law); *see also* Lyons, *supra* note 78 (discussing the practicality of a tort action).

80 *See* Matsuda, *supra* note 48, at 341 (discussing the different approaches, and the benefits of each).

81 *See generally* Kaimipono David Wenger, *Reparations Within the Rule of Law*, 29 T. JEFFERSON L. REV 231 (2007).

82 Several scholars whose views are critical on the whole have nonetheless adopted pragmatic practical reparations arguments.

83 *See* Magee, *supra* note 9, at 868 (comparing nationalist versus integrationist approaches to civil rights).

they can be integrationist in tone, while still seeking broader changes in society.[84]

Thus, the radical versus practical divide is a new way to approach and frame reparations discourse. This approach classifies reparations arguments based on their stated goals and advocacy methods. In doing so, it can allow us to better understand the history of reparations dialogue. This is not to suggest 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. This framework offers insight into important trends in the discussion. As Aiyetoro and Davis write in their own analysis of reparations as a social movement, "reparations claims are meaningful not only for what they tell us about the law and legal institutions, which thus far have largely denied redress, but also for what these suits and other non-legal activism reveal about the people who bring them and the social movements in which they participate."[85]

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

B. Practical and Radical Reparations From 1865 to 2000

With the practical/radical framework now set out, we can focus on 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. However, they were radical because, at the time, even those limited steps were a major societal upheaval. In addition, these proposals were sometimes justified with radical rhetoric.[86]

Fifty years after the Civil War, reparations dialogue entered a lengthy period of domination by more radical ideas. For instance, Marcus Garvey's proposals for repatriation were quite radical. His criticism of America and suggestions for universal African citizenship also showed a deep discontent

84 *See generally* Roy L. Brooks, Racial Justice in the Age of Obama 77-88 (2009) (discussing limited separation and integration approaches).

85 Aiyetoro & Davis, *supra* note 8, at 689-90.

86 *See* BROPHY, *supra* note 1, at 27. Sen. Stevens argued that land redistribution was necessary because "the whole fabric of southern society *must* be changed."

with existing power structures.[87] 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.[88] Garvey's radicalism showed Black frustration with the unfulfilled promises of the Reconstruction Era.

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 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."[89]

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 were "susceptible to ordinary legal analysis."[90] However Bittker was criticized precisely because of his attempt to distance reparations from their radical roots. Derrick Bell stated, "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."[91]

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.[92] While Matsuda's article was radical

87 *See* Adjoa Aiyetoro, *Formulating Reparations Litigation Through the Eyes of the Movement*, 58 N.Y.U. ANN. SURV. AM. L. 457, 462 (2003) (noting that Garvey "spoke to getting away from a government that had oppressed so brutally").

88 *See generally* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION (2002).

89 BARKAN, *supra* note 40, at 286, 289.

90 BITTKER, *supra* note 43, at 68.

91 Bell, *supra* note 46 at 162.

92 *See* Matsuda, *supra* note 48, at 388-99.

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 consider reparations for slavery to be a serious legal topic.[93] Rather, both groups seemed to view reparations as a topic for other forums; it was not related to the law.[94]

The subsequent law review articles by Magee and Verdun served as a bridge from radical reparations discussions to more practical legal discourse. While each argument was radical with respect to its scope and conclusions, they also introduced some more practical analysis. This is not surprising; Matsuda believed that the critical/liberal divide was overstated, and that the two views could in fact support each other.[95] Like Matsuda, both Verdun and Magee make some concessions to practical, rather than radical, approaches to reparations.[96] 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 though; for instance, neither article argued for reparations within the existing legal framework. However, while essentially radical in tone, Magee's article reflects some aspects of a practical reparations argument; Verdun's article similarly straddles the divide.

III. POST MILLENNIAL REPARATIONS RHETORIC: THE RISE AND FALL OF REPARATIONS LAWSUITS

A. Practical Reparations and the Rise of Reparations Lawsuits.

Around the year 2000, a new kind of reparations discourse emerged as legal academics examined reparations using tort doctrines. These scholars, including Al Brophy, Charles Ogletree, and Robert Westley, developed a legal reparations narrative focused on bringing tort or tort-like claims private companies that profited from slavery.[97] The first example of this

93 *See* Magee, *supra* note 9, at 900-01 (stating that legal scholars have paid little attention to reparations).

94 These discussions were certainly taking place in other venues, though, as illustrated by reparations discussion during the 1960s in the *New York Review of Books*. *See* Walter Olson, *Reparations R.I.P.*, CITY JOURNAL, Autumn 2008, at 89.

95 *See* Matsuda, *supra* note 48, at 352-53 (laying out several considerations upon which a united front could be built between radical and practical critics).

96 *See* Magee, *supra* note 9, at 913 (focusing instead on the division between "mainstream" and "outsider" approaches to reparations).

97 The earlier high-profile *Cato* lawsuit, not framed as a tort action against private parties, had been

approach was Robert Westley's 1998 law review article *Many Billions Gone*.[98] Westley argued that it was time to "reconsider and revitalize the discussion of reparations" using tort concepts to address the harms of slavery.[99] His article drew on both the radical and practical traditions; while Westley couched his proposal in radical language, he also made distinct moves towards a practical, lawsuit-driven approach. In particular, Westley suggested "mapping a legal path to enforcement of Black reparations,"[100] and his article focused on particular legal remedies as attainable goals in a way that had not previously been attempted. [101]

Westley's work paved the way for a variety of articles focusing on specific legal strategies.[102] Legal articles were often the work of established scholars in other fields who had not previously written about reparations. For instance, scholars including Anthony Sebok, Eric Miller, and the participants in a 2002 symposium at New York University examined discrete legal questions relating to unjust enrichment and the statute of limitations.[103] Indeed, the topic was a new focus for legal scholarship, as 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,[104]

dismissed a few years earlier. See infra notes 172-73 and accompanying text.

98 *See* Robert Westley, *Many Billions Gone: Is it Time to Reconsider the Case for Black Reparations?*, 40 B.C. L. REV. 429, 432 (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.

99 *Id.* at 432.

100 *Id.* at 433.

101 *See* BROPHY, *supra* note 1, at 67-69 (discussing the impact of Westley's article as "[t]he single most important article in modern reparations theory" which "marked a key turning point in the reparations debate").

102 *See id.* at 97-140 (exploring the development of legal arguments about reparations).

103 *See* Symposium, *A Dream Deferred: Comparative and Practical Considerations for the Black Reparations Movement*, 58 N.Y.U. ANN. SURV. AM. L. 447 (2002) (containing articles discussing the relationships between reparations and various legal concepts); Eric J. Miller, *Reconceiving Reparations: Multiple Strategies in the Reparations Debate*, 24 B.C. THIRD WORLD L. J. 45, 52 (2004) (arguing that unjust enrichment theory may encourage hostile attitudes on either side of the reparations debate); Anthony J. Sebok, *Two Concepts of Injustice in Reparations for Slavery*, 84 B.U. L. REV. 1405, 1416, 1419 (2004) (discussing reparations lawsuits brought under the theory of unjust enrichment and some of the obstacles these lawsuits faced, such as statutes of limitations bars).

104 Some practical articles include Miller, *supra* note 103; Keith Hylton, *Slavery and Tort Law*, 84 B. U. L. REV. 1209 (2004); Kaimipono David Wenger, *Slavery as a Takings Clause Violation*, 53 AM. U. L. REV. 191 (2003) (framing the reparations argument as a legal claim for a Takings Clause violation); Wenger, *supra* note 81; and Sebok, *supra* note 99. Radical articles include Lee Harris, *Political Autonomy as a Form of Reparations to African-Americans*, 29 S.U. L. REV. 25 (2001); Joe Feagin, *Documenting the Costs of Slavery, Segregation, and Contemporary Racism: Why Reparations Are in Order for African Americans*, 20 HARV. BLACKLETTER L.J. 49 (2004); and Aiyetoro, *supra* note 83. A few articles bridge the divide or incorporate both arguments. *See, e.g.* Westley, *supra* note 98; Charles J. Ogletree, *Repairing the Past: New Efforts in the Reparations Debate in America*, 22 HARV. C.R.-C.L. L. REV. 38 (2003).

by generally focusing on framing reparations questions in legal terms and discussing 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, the types of defendants, plaintiffs, and damages, as well as the difference between tort and unjust enrichment claims.[105] He discusses the questions of causation that arise in the reparations context,[106] specific defenses like the statute of limitations,[107] and specific rulings from courts in reparations litigation cases.[108]

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 tort and unjust enrichment theories.[109] In 2003, advocates filed suit in *Alexander v. Oklahoma*, seeking compensation for victims of the Tulsa riot.[110]

B. The Raison d'être of Reparations Lawsuits

a. Potential Benefits of Reparations Lawsuits

Lawsuits played a specific role in reparations strategy, and offered important benefits.[111] 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.[112]

Legal scholars offered a good hook for believing that recovery was possible. The theory of group compensation changed significantly between

105 *See id.* at 97-117 (discussing specific aspects of reparations litigation).

106 *See id.* at 100-02 (noting typical causation problems).

107 *See id.* at 102-03 (commenting on the statute of limitations and how courts have applied it).

108 *See id.* at 121-33 (discussing how courts have ruled in such cases).

109 Farmer-Paellmann v. FleetBoston Fin. Corp., No. CV-02-1862 (E.D.N.Y. Mar. 26, 2002) (complaint and jury trial demand), *available at* http://*news.findlaw.com/cnn/docs/slavery/fpllmnflt 032602cmp.pdf*. *See* Kaimipono David Wenger, *Causation and Attenuation in the Slavery Reparations Debate*, 40 U.S.F. L. REV. 279, 297-301 (2004) (discussing claims brought against corporate defendants).

110 *See* BROPHY, *supra* note 1, at 128-32 (describing the *Alexander* lawsuit).

111 *See* Westley, *supra* note 98, at 467-76 (discussing the potential benefits of reparations).

112 See ROBINSON, *supra* note 60, at 235-47 (encouraging the Black community to take power by seeking remedies for injustice); *see also* Westley, *supra* note 98, at 468-70, 474-76 (noting the need to empower the Black community).

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 relocation camps during World War II.[113] The Japanese-American compensation began in part from litigation, and while the case itself failed, the increased public consciousness of the Japanese-Americans' story – along with a congressional report – eventually led to legislation granting compensation.[114] Similarly, Holocaust victim groups brought suit in the 1990s seeking compensation for enslavement, human rights abuses, and unjust enrichment.[115] After protracted litigation, a series of settlements provided various victims with some degree of restitution.[116] Other large group compensation cases played out over the same time period, including tobacco litigation which eventually resulted in a massive settlement.[117]

Discussion of reparations lawsuits explicitly built on these models; for instance, Robert Westley cited Japanese Americans and Holocaust victims as potential precedents.[118] The focus was on practical remedies like mass restitution in a tort context. In one important article, Brophy set out the goal for reparations cases, later elaborated in *Pro & Con*, "focus[ing] on the moral and legal case for reparations and how proposals made might actually work."[119] Adjoa Aiyetoro wrote that "the next step towards success is to formulate a cognizable legal claim within the judicial

113 *See* ERIC K. YAMAMOTO ET AL., RACE, RIGHTS, AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT 390, 401-05 (2001) (giving background on Japanese-American internee reparations).

114 *See id.*

115 *See* BROPHY, *supra* note 1, at 45-46 (discussing claims brought by Holocaust survivors after World War II); *see also* Westley, *supra* note 98, at 453-58 (explaining the steps taken by European Jews after World War II to reclaim their property). *See generally* BARKAN, *supra* note 40, at 88-111 (providing background on the Holocaust restitution claims); Bert Neuborne, *Holocaust Reparations Litigation, Lessons for the Slavery Reparations Movement*, 58 N.Y.U. ANN. SURV. AM. L. 615, 621 (2003) (analogizing the problems facing lawsuits brought by Holocaust descendants to those faced by descendants of slavery).

116 *See* BROPHY, *supra* note 1, at 45-46 (mentioning the outcome of post-World War II claims brought by Holocaust survivors and their families).

117 *See* Robert L. Rabin, *A Sociolegal History of the Tobacco Tort Litigation*, 44 STAN. L. REV. 853, 874-75 (1992) (discussing the two waves of tobacco litigation); *see also* Wenger, *supra* note 109, at 306-16 (exploring the analogy between reparations and mass torts, focusing on Agent Orange, DES, Bendectin, tobacco and asbestos litigation).

118 *See* Westley, *supra* note 98, at 449-60 (examining the methods by which Congress granted reparations to these groups, and suggesting that successful reparations claims depend on the political climate and fitting tightly within the individual rights paradigm); *see also* Alfred Brophy, *Some Conceptual and Legal Problems in Reparations for Slavery*, 58 N.Y.U. ANN. SURV. AM. L. 497, 500-01 (2002) (discussing reparations precedents including Japanese Americans and Holocaust claimants).

119 Brophy, *supra* note 118, at 497.

system."[120]

Legal actions provided secondary benefits as well. For instance, they potentially opened the door for discovery. In some mass restitution cases, such as the tobacco litigation, that power ultimately ended up being instrumental in providing information that ultimately led to settlement.[121] In addition, information gleaned from the legal process could be used for storytelling and consciousness-raising.[122]

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 characterized as legally culpable wrongdoers.[123] These lawsuits also 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.[124]

Lawsuits 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 and Garvey's repatriation plans. Advocates have disagreed over many questions relating to remedies or recipients.[125] 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 a concrete goal, the possibility of closure, which could be used to

120 Aiyetoro, *supra* note 40, at 144. *See also id.* at 134 ("One of the challenges is to create legally cognizable claims for reparations.").

121 *See* Rabin, *supra* note 113, at 867-68 (discussing how discovery tactics played an important role in tobacco litigation).

122 *See* BROPHY, *supra* note 1, at 145 (noting that disclosure leads to consciousness-raising, which sets the stage for reparations); *see also* Matsuda, *supra* note 48, at 359 (defining consciousness-raising). Specifically, Matsuda notes that:

> 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. *Id.*

123 *See generally* ROBINSON, *supra* note 60 (framing reparations as a question of debt).

124 There is an important symbolic value in taking a claim to court. 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. *See* Magee, *supra* note 9, at 900, 905.

125 *See, e.g.*, Charles Ogletree, *From Brown to Tulsa: Defining Our Own Future*, 47 HOWARD L.J. 499, 578 (2004) (proposing that reparations would "not be divided equally" and would not be given to wealthy Blacks).

defuse critics who claimed that reparations claims created a never-ending process.[126]

Consequently, over the last decade, within the confines of legal academia, the concept of reparations lawsuits gained some currency. Conferences and papers examined topics like the statutes of limitations,[127] unjust enrichment,[128] mass torts,[129] Indian law,[130] takings,[131] and other discrete legal issues, and a certain type of dialogue emerged. As the lawsuits progressed, reparations talk[132] became increasingly flavored with legal terminology. At the same time, radical ideas on reparations were no longer a significant part of the discussion. That is, the emergence of reparations lawsuits and the accompanying narrative fostered a new tone in the dialogue. Additionally, it partially replaced the earlier diffused, broad and radical approach to reparations with a newer focused and narrow legal vision.

b. Reparations Lawsuits in a Multi-Prong Legal Narrative

Reparations lawsuits were generally intended as part of a strategy including other components.[133] 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 through legislative action or some sort of settlement.[134]

126 *See* BROPHY, *supra* note 1, at 176 (arguing for the strategic need for an endpoint); *see also* Saul Levmore, *The Jurisprudence of Slavery Reparations: Privatizing Reparations*, 84 B.U. L. REV. 1291, 1302 (2004) (commenting on finality concerns); Charles Krauthammer, *Reparations for Black Americans*, TIME, Dec. 31, 1990, at 18 (suggesting that reparations would be an acceptable price for finality).

127 *See generally* Miller, *supra* note 103 (focusing on tolling or otherwise avoiding the statute of limitations).

128 *See generally* Sebok, *supra* note 103 (analyzing the unjust enrichment that occurred as the result of discrimination and the reparations that followed to remedy that treatment).

129 *See generally* Wenger, *supra* note 109 (examining the analogy between reparations and mass torts).

130 *See* Rebecca Tsosie, *Acknowledging the Past to Heal the Future: The Role of Reparations for Native Nations*, *in* REPARATIONS: INTERDISCIPLINARY INQUIRIES (Jon Miller & Rahul Kumar eds., 2007); *see also* Rebecca Tsosie, *Engaging the Spirit of Racial Healing within Critical Race Theory: An Exercise in Transformative Thought*, 11 MICH. J. RACE & L. 21 (2005) (describing the history and development of restitution claims in Indian Law).

131 *See* Wenger, *supra* note 81, at 257-58 (analyzing the takings argument in the reparations context).

132 *See generally* Alfred L. Brophy, *Reparations Talk: Reparations for Slavery and the Tort Law Analogy*, 24 B.C. THIRD WORLD L.J. 81 (2004) (describing the development of reparations talk).

133 *See* Aiyetoro, *supra* note 40, at 137 (noting that reparations advocacy requires a multi prong strategy).

134 *See* Westley, *supra* note 98, at 436 (arguing that it is Congress, and possibly state legislatures, that must be persuaded to enact reparations); Brophy, *supra* note 118, at 535-40 (noting the need for

This reflected the fact that victories for other groups have typically come through settlement, not trial.[135] 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."[136] He later concludes that "given the limitations of lawsuits, significant reparations are likely to come – if at all – through legislation."[137] This captures the conventional wisdom: reparations advocates, like most plaintiffs, were hoping to settle.[138] 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, whether private or public.

The ultimate goal of advocates pushing reparations lawsuits was to create pressure for settlement. This did not require lawsuits to be successful. For instance, it was a combination of publicity and changed attitudes, as well as the possibility of legal liability, that ultimately led to the Holocaust victims settlement.[139] Similarly, initial lawsuits seeking compensation for Japanese-American internees were ineffective, but lobbying led to federal legislation which created a commission to study and report on the internment. In turn, that commission 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 by passing legislation granting restitution.[140] Indeed, civil rights

development of dialogue and scholarship to address the possibility of settlement); Miller, *supra* note 103, at 51-56 (suggesting that settlement is more likely to be successful than litigation).

135 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 Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689, 694-98 (2003); *see also* In Re Holocaust Victims Assets Litigation, 105 F. Supp. 2d 139 (E.D.N.Y. 2000).

136 BROPHY, *supra* note 1, at 126.

137 *Id.* at 133; *see also* Wenger, *supra* note 109, at 305 ("[u]ltimately, however, reparations cases may not be best suited for success in court"); Westley, *supra* note 98, at 435 (noting that "legislatures provide a friendlier forum than courts").

138 The end goal for most litigants in the modern court system is to reach a settlement. *See* Peter H. Schuck, *The Role of the Judge in Settling Complex Cases: The Agent Orange Example*, 53 U. CHI. L. REV. 337, 337 (1986); *see also* Mark Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339 (1994); JACK B. WEINSTEIN, INDIVIDUAL JUSTICE IN MASS TORT LITIGATION (1993).

139 *See* Sebok, *supra* note 103, at 1407-10 (noting that settlements were reached in part because of political and social pressures to reach a settlement).

140 *See* YAMAMOTO, *supra* note 113, at 390 (discussing how the end result was reached in the Japanese-American reparations issue). Activists had gained valuable exposure and vindication through *coram nobis* suits dismissing unjust prior convictions, but all cases for restitution were dismissed. *See id.* at 278-80. A *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 *coram nobis* relief; *see also id.* at 319-40 (setting out the court's *coram nobis* opinion, as well as background).

history more broadly shows that legal success is not always a necessary step in changing views or reaching goals.[141]

Any settlement of this sort would need public support.[142] Thus, moral arguments played an important 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."[143] Moral arguments would be a foundation for settlement; as Brophy noted, "[t]he 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."[144]

The overall strategic approach 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, as in the case of Japanese-Americans and Holocaust victims.[145] This new legal narrative

141 *See* MICHAEL KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2006) (recognizing that there was very little legal change between *Plessy* and *Brown*; rather, the court in *Brown* responded to changing social and political circumstance); *see also* Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 113 (1988) (discussing how government began to support desegregation when this seemed necessary due to American foreign policy objectives); Mary L. Dudziak, *The* Little Rock Crisis *and Foreign Affairs: Race, Resistance, and the Image of American Democracy*, 70 S. CAL. L. REV. 1641, 1690 (1997) (stating how decisions about Little Rock were made with a view towards their impact on foreign relations).

142 *See* YAMAMOTO, *supra* note 113, at 479-82; 496-97 (discussing political element in reparations advocacy); Kevin Hopkins, *Forgive U.S. Our Debts?*, 89 GEO. L.J. 2531, 2539 (2001) (noting that any settlement will require support from white voters); *see also* Hylton, *supra* note 76, at 34 ("[P]roponents 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 towards the courts."); Eric Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689, 709-11 (2003) (noting "[s]ome reparations programs might be explained as efforts to remove a moral taint"); Alfred Brophy, *Reconsidering Reparations*, 81 IND. L.J. 811, 824-25 (2006) (stating that, optimistically speaking, education will force the American conscience to pay reparations); Derrick Bell, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) (emphasizing that Blacks are most likely to be politically successful when they can convince whites that their political interests are aligned).

143 *See* Miller, *supra* note 103, 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, *supra* note 113, 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.").

144 Brophy, *supra* note 132, at 86.

145 *See, e.g.*, BROPHY, *supra* note 1, at 3 (discussing how Conyers' bill is linked to the reparations

altered the prior reparations dialogue, 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 dialogue 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. Thus, it focused attention on tort remedies; potentially broader types of remedies were not a central part of the narrative.[146] The narrative also ended up including some other specific harms, such as those from the Tulsa race riots, which could also fit under the tort umbrella. This framing conveyed certain messages. Tort law is the traditional arena for addressing private harms between individuals.[147] Placing reparations claims in the sphere of tort sends a message that these claims should be perceived as private delicts, rather than harms arising from state-sponsored oppression.[148]

Because of its narrow tort focus, this narrative excluded many other types of claims for harm to Blacks, such as voter suppression,[149] violence and lynching,[150] cultural theft,[151] peonage and slave-like convict labor

experience of Japanese-American internees).

146 *See* BROPHY, *supra* note 1, at 23-26 (examining the scope of reparations lawsuits); *see also* Hylton, *supra* note 74, at 36-38 (distinguishing reparations claims from other tort claims).

147 *See* BROOKS, *supra* note 16, at 138-40 (discussing the tort approach); Kaimipono David Wenger, "Too Big to Remedy?" Rethinking Mass Restitution for Slavery and Jim Crow, 44 Loyola L.A. L. Rev. 177, 205-08 (discussing the limits of tort law in addressing harms to disadvantaged groups); *see generally* Jennifer B. Wriggins, *Automobile Injuries as Injuries with Remedies: Driving, Insurance, Torts, and Changing the "Choice Architecture" of Auto Insurance Pricing*, 44 Loyola L.A. L. Rev. 69, 71-73 (discussing the operation of tort law as a private remedy in the automobile injury context); Jack B. Weinstein, Compensation for Mass Private Delicts: Evolving Roles of Administrative, Criminal, and Tort Law, 2001 U. Ill. L. Rev. 947 (discussing tort law as private remedy); Adam Zimmerman, *Distributing Justice*, 85 N.Y.U. L. REV 500 (2011).

148 *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).

149 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, 122 (2008).

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

150 *See* Emma Coleman Jordan, *A History Lesson: Reparations for What?*, 58 NYU ANN. SURV. AM. L. 557, 557-59, 566, 612-13 (2004); *see also* Magee, *supra* note 9, at 894 (describing the "post-Reconstruction terrorism" of beatings and lynchings); *see also* SHERRILYN IFILL, ON THE COURTHOUSE LAWN (2007).

practices,[152] educational inequity,[153] discrimination,[154] and societal racism in general.[155] These omissions meant that this narrative would fail to address some areas of major racial disparity and harm. For instance, housing segregation derives from the same underlying racist motives as slavery, and has had similar deleterious effects on Blacks.[156] Nevertheless, such broad non-tort claims were not included in reparations litigation, and thus were downplayed in the post-millennial reparations dialogue.

The narrative may have wrongly implied that non-tort-like claims lacked value. Clearly, slavery is the greatest harm that society has inflicted on Blacks, and much of slavery fits into the tort framework. Nonetheless, the harms of slavery are entangled with other effects of racism, such that it is not clear today that slave descent itself is more harmful to Blacks than segregation, educational inequity, or other harms caused by racism.[157]

Even within the broad tort-based structure there were strategic legal questions about which instances of tort-like harm to include in reparations lawsuits.[158] Slavery offered the strongest moral claims.[159] Yet, it was also

151 *See generally* K.J. Greene, *"Copynorms," Black Cultural Production, and the Debate Over African-American Reparations*, 25 CARDOZO ARTS & ENT. L.J. 1179, 1183-85 (2008) (describing how Black cultural property, especially music, was unjustly appropriated).

152 *See* Aziz Z. Huq, *Peonage and Contractual Liberty*, 101 COLUM. L. REV. 351 (2001) (discussing the history of peonage); *see also* DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II (2008) (setting out the history of forced labor practices akin to slavery).

153 *See generally* Maurice Dyson, *When Government is a Passive Participant in Private Discrimination: A Critical Look at White Privilege & the Tacit Return to Interposition in* PICS v. Seattle School District, 40 U. TOLEDO L. REV. 145, 148 (2008) (discussing education discrimination due to unequal funding).

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.

155 *See* Eric Miller, Presentation at Thomas Jefferson School of Law: Reparations Manifesto (March 2006); *see also* BROOKS, *supra* note 16, at 38-40, 201-04; Feagin, *supra* note 101, at 57 (discussing negative social and health effects of discrimination); Wenger, *supra* note 81, at 239 (opining that society is removing Rule of Law protections).

156 *See* BROPHY, *supra* note 1, at 108 (discussing questions of segregation).

157 *See* Aiyetoro, supra note 40, at 142 (cataloguing areas where Blacks suffer from subordination, including criminal law, education law, and others); *see also* James R. Hackney, Jr., *Ideological Conflict, African-American Reparations, Tort Causation, and the Case for Social Welfare Transformation*, 84 B.U. L. REV. 1193, 1197 (2004) (noting that many Blacks who are not slave descendants suffer from contemporary racism).

158 *See, e.g.*, Westley, *supra* note 98, at 465-66 (listing the material bases of a claim for reparations); *see also See* Hylton, *supra* note 76, at 43 ("[O]ne should avoid the mistake of viewing [reparations claims] 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.").

uniquely subject to some legal defenses, grounded on the passage of time, the constitutionality of the institution, and other unique vulnerabilities.[160] 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 concurrently 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.[161] This was troubling because slavery is the "emotional component that provides the moral leverage" for reparations.[162]

The legal narrative that ultimately developed did not end with slavery, but also focused on later harms, such as the Tulsa race riot.[163] Tulsa was a little-known and compelling story which offered some advantages. Less time had passed, and some of the victims were still living. Tulsa seemed to present an excellent chance for reparations.[164]

The broader question remained, however: how to jointly address Jim Crow and slavery. Although the two shared many features, the legal differences were significant. Tulsa offered more attractive legal claims for living claimants; but, the fact that Tulsa differed from slavery in certain respects made it so that advocates could not effectively package the two into one lawsuit.[165] Thus, a separate lawsuit would need to focus solely on Tulsa, but this had a downside, stripping claimants of the compelling moral and emotional claims stemming from the "super-wrong" of slavery.[166] The best legal options did not always track the best moral options – and this was just one area where moral and legal considerations diverged.[167]

159 *See* Bell, *supra* note 46, at 158 (discussing the moral force of slavery claims).

160 *See, e.g.*, Wenger, *supra* note 81, at 249-51 (examining retroactivity); Wenger, *supra* note 109, at 302-06 (discussing unique attenuation problems in slavery reparations); BROPHY, *supra* note 1, at 75-76 (analyzing the arguments against reparations).

161 *See* Bell, *supra* note 46, at 158.

162 *Id.*

163 *See* BROPHY, *supra* note 1, at 50-51, 128-33 (discussing the *Tulsa* case).

164 *See id.* at 128, 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.").

165 *See id.* at 132 ("Tulsa is at once both compelling and limiting.").

166 *See* Magee, *supra* note 9, at 901; *see also* Bell, *supra* note 46, 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).

167 Reparationists also disagreed on the appropriateness of some legally strong, but morally limited, doctrines like unjust enrichment. *Compare* Sebok, *supra* note 103, at 1440-42, *with* Hanoch Dagan, *Restitution and Slavery: On Incomplete Commodification, Intergenerational Justice, and Legal Transmissions*, 84 B.U. L. REV. 1139, 1158-63 (2004). Unjust enrichment claims were included in the lawsuit. *See* Wenger, *supra* note 109, at 284-86.

Another oddity of the legal narrative was its potential colorblindness. Of course, race is implicit in any discussion of legal harms caused by slavery. However, the analyses of legal topics, such as statutes of limitations, were done on a purely legal level. One could imagine a hypothetical problem not involving race, where such analysis would apply, such as a large mass tort case. And in fact, reparations scholarship drew extensively from race-neutral legal precedents.[168] Since the lawsuit approach was based on legal claims, reparations could be merely a legal issue, no longer necessarily tied to racism or racial justice. Reparations lawsuits could operate independent of the victims' Blackness. This is troubling because, as critical race theorists have shown, colorblind legal arguments can perpetuate racial subordination.[169]

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. Matsuda 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.[170] In contrast, the tort approach focused on specific legal claims, rather than the underlying racial inequities.

Largely because of its exclusions and limitations, the legal narrative was unsatisfying for some reparations advocates.[171] While it offered useful benefits, it was also limited or even impoverished in some important ways: the narrative 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.

168 This includes my own work. *See* Wenger, *supra* note 109.

169 *See, e.g.*, Crenshaw, *supra* note 2, at 1384. Colorblindness perpetuates the white perspective as the underlying norm and does not address the problem of underlying hierarchy; and solutions for the problem of racial injustice must acknowledge the race consciousness that pervades the American psyche. *See id.* The color-blind approach is internally inconsistent and is not helpful in protecting minority rights. Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* 44 STAN. L. REV. 1, 30 (1991). This criticism is not universally accepted, and some advocates have championed a colorblind approach. *See* 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) (advocating colorblind reconstruction based on "universal human dignity" rather than race); *see also* Magee, *supra* note 9, at 898-900.

170 *See* Matsuda, *supra* note 48, at 348-53 (noting the inequality in using legal norms that didn't take into account the viewpoint of the oppressed).

171 *See, e.g.*, Jordan, *supra* note 150, at 559 (arguing that "an exclusive focus on slavery is misguided").

D. The Failure of Reparations Lawsuits

Tort suits were not the first legal failure for reparations. Reparations claims 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.[172] However, *Cato* predated the shift in mass restitution that occurred in the late 1990s, when innovative legal strategies and claims of unjust enrichment resulted in eventual settlements and reparations for victims of the Holocaust.[173]

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, because it involved living victims and a recent government admission of culpability.[174] 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."[175] Between the Tulsa claims and the corporate claims, legal success seemed possible.

Alas, that dream was not to be. Corporate claims were consolidated into the Northern District Court of Illinois, which dismissed the claims in *In re Slave Descendants*, holding that they were barred by a variety of legal hurdles, including standing and statutes of limitations.[176] Despite academic criticism of that decision,[177] it remained essentially unchanged, and the Court of Appeals for the Seventh Circuit affirmed the dismissal of the major claims.[178] Tulsa claims failed as well. The *Alexander* case seeking compensation for the Tulsa race riot victims was dismissed as barred under the statute of limitations, a holding affirmed on appeal.[179] While some

172 *See* Cato v. United States, 70 F.3d 1103, 1111 (9th Cir. 1995); *see also* BROPHY, *supra* note 1, at 121-22.

173 *See* BROPHY, *supra* note 1, at 45-46 (mentioning the Swiss bank Holocaust lawsuits of the mid-1990s); *see also* Sebok, *supra* note 103, at 1415 (discussing the Holocaust litigation).

174 *See* BROPHY, *supra* note 1, at 128-32. *See generally* Alfred L. Brophy, *Reconstructing the Dreamland: The Tulsa Riot of 1921* (2002) (giving background of Tulsa riots).

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, *available at* http://writ.news.findlaw.com/sebok/20030310.html . *See* DeWayne Wickham, *Tulsa Case is Key Reparations Test*, USA TODAY, March 25, 2003; *see also* BROPHY, *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 103, at 52.

176 *See* BROPHY, *supra* note 1, at 124 (listing the various reasons why the claims were barred); *see also* Wenger, *supra* note 109 (mentioning some of the reasons why claims may be barred in a mass tort context).

177 *See* Wenger, *supra* note 109, at 316-26; *see generally* Hackney, *supra* note 158.

178 *See* In re African-American Slave Descendants Litigation, 471 F.3d 754, 763 (7th Cir. 2006). One peripheral claim relating to fraud was not dismissed. *See* Farmer-Paellman v. Brown & Williamson Tobacco Corp., 552 U.S. 941 (Oct. 1, 2007) (denying certiorari).

179 Alexander v. Oklahoma, 382 F.3d 1206 (10th Cir. 2004); *see* BROPHY, *supra* note 1, at 131-32

important gains were made in the litigation, the compensation claims were dismissed entirely.

E. Reasons the Lawsuits Failed

The new generation of reparations lawsuits[180] failed for a variety of reasons, including specific legal concerns and larger structural problems. First, the courts viewed the causation questions raised by reparations cases as too complex to allow for legal liability. Indeed, reparations lawsuits created uniquely complex causation issues. As I have written previously, the reparations cases involved *victim attenuation* (the link between deceased slaves and present claimants), *wrongdoer attenuation* (the link between slaveholders and current defendants), and *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; no case involving such complex attenuation questions has ever succeeded, whether at trial or settlement.[181] Reparationists have long been aware of these concerns.[182]

The problem was exacerbated by the specific composition of the plaintiff class in the *Slave Descendants* case. Plaintiffs were unable to show that they suffered harm traceable to the named defendants.[183] The District court relied chiefly on this lack of connection in dismissing the lawsuit, finding that the plaintiffs could not "establish a personal injury sufficient to confer standing by merely alleging some genealogical relationship to African-

(discussing the *Alexander* case).

180 *See* Verdun, *supra* note 54, 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"); *see also supra* notes 8-21 (discussing very early reparations attempts and how reparations lawsuits and other proposals have existed in some form or another since before the Civil War).

181 *See* Wenger, *supra* note 109, 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." *Id.* at 305.

182 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, *supra* note 1, at 99; *see also* Matsuda, *supra* note 48, at 374-85.

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, *supra* note 1, at 123. *See also id.* at 108 (arguing that the consolidated case was brought prematurely, because there was not sufficient research to link plaintiffs and defendants); Wenger, *supra* note 109, at 316-21 (discussing the possible future use of statistical evidence in reparations litigation, but noting that this evidence does not yet exist)..

Americans held in slavery over 100, 200, or 300 years ago."[184] The appellate court agreed, opining 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."[185]

The statute of limitations was also a fatal barrier.[186] There may have been potential ways around the statute of limitations; as Brophy noted, courts could toll the statute, or legislators could pass legislation allowing a suit to go forward.[187] Absent some affirmative step, however, statutes of limitation blocked the claim. The court found these barriers fatal to the case, holding 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.[188]

Other legal hurdles also affected the recent lawsuits. The most significant of these was sovereign immunity, which not only led to the dismissal of the *Cato* case, but also led plaintiffs to bring relatively weaker lawsuits against corporations.[189]

The underlying problem was the limited scope of the judicial system in general. 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 harmsFalse 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 well into existing social structure, not those "at the bottom" of the

184 In re African-American Slave Descendants Litigation, 471 F.3d 754, 752 (7th Cir. 2006).

185 *Id.* at 759.

186 Brophy notes that "there would be serious problems" with statutes of limitation. BROPHY, *supra* note 1, at 126.

187 *See id.* at 126-27.

188 In re African-American Slave Descendants Litigation, 375 F.Supp.2d 721, 773 (N.D. Ill. 2005).

189 *See* BROPHY, *supra* note 1, at 121-23 (discussing sovereign immunity); *see also* Wenger, *supra* note 93, at 248-49 (suggesting one way to avoid this barrier).

190 BROPHY, *supra* note 1, at 98.

social ladder.[191] Novel legal ideas do not fit well into this formula.[192] Given the limits of the judicial system and the underlying legal doctrines, it is not surprising that reparations lawsuits failed. They did not fit into the existing framework.[193] As I noted in another context, reparations claims simply weren't "torty."[194]

IV. REPARATIONS DISCOURSE FOLLOWING LAWSUIT FAILURE

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. Thus, lawsuit failure has several effects. Lawsuits failed to provide direct reparation, nor were advocates able to use them to obtain discovery, or other piggyback effects, such as in the tobacco litigation. Furthermore, reparation lawsuits failed to create the desired secondary effect of a litigation-impelled settlement, whether through congressional action or private company embarrassment. Finally, the existence of the reparations lawsuits did not lead to a shift in public opinion about large scale reparations. In short, not only were the lawsuits themselves ineffective, the legal narrative itself failed.

A major problem was the mismatch between the lawsuits and the strategic needs of the movement. Because the earlier lawsuits against governments had been dismissed, the *Slave Descendants* plaintiffs targeted private companies whose corporate forebears were involved in different aspects of the slave trade.[195] The focus on those defendants was problematic because of their relatively low moral culpability. But none of the more culpable actors – the individual slave holders who committed the torts, or the state and federal governments that created and enforced the regime – were available as defendants. Individual slave owners had died, taking their legal culpability to the grave with them, and governments were

191 *See generally* Matsuda, *supra* note 48 (lamenting that rules tend to privilege claimants who fit into well existing social structure).

192 *See* BROPHY, *supra* note 1, at 108; Wenger, *supra note* 143, at 196-205.

193 *See* Wenger, *supra* note 147, at 196-212. Ironically enough, the best reparations claims, from a legal perspective, were the very early claims, which had a strong causal connection. However, such claims had no chance of success, due to widespread societal racism. *See supra* notes 8-21 and accompanying text.

194 Wenger, supra note 147, at 205.

195 *See id.* at 248, 256-58 (examining the *Cato* case); BROPHY, *supra* note 1, at 123 (describing the *Slave Descendants* lawsuit).

shielded by sovereign immunity.[196] Meanwhile, corporate actors had inherited their predecessors' debts as a matter of successor company law.[197] But they did not inherit clear moral culpability for their predecessors' wrongs; thus, the moral claims against them were less compelling.[198] As Roy Brooks phrased it, the tort approach suffered from "moral deficiency."[199]

The lesser moral culpability of defendants would have been largely moot if legal claims had succeeded. But legal culpability was also unclear because of the attenuated causal links between plaintiffs and defendants.[200] Thus, the lawsuits inhabited a problematic no-man's-land. They were bound by legal requirements that limited them to defendants of lesser moral culpability, yet claims were not legally strong enough to succeed in court. It was the worst of both worlds.

In part because of their reliance on less clear moral claims, the lawsuits were unable to follow the lead of prior precedents and shift public opinion as the legal narrative had contemplated.[201] For instance, the litigation regarding Japanese-Americans served an important educational purpose and helped to shape public opinion.[202] But reparations lawsuits had a tougher path. They relied on retelling an older story and more conceptually challenging story. The same causal attenuation which had undercut the lawsuits 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 in the abstract, but advocates could not convince the public that corporate successors of antebellum railroad companies should foot the bill.

The post-millennial racial climate is a mixed bag for reparations advocates. On one hand, there is widespread public acceptance of basic

196 *See* Wenger, *supra* note 109, at 296-301 (explaining that governments are shielded by sovereign immunity).

197 *See* BROPHY, *supra* note 1, at 123 (describing the corporate defendants); *see also* Wenger, *supra* note 109, at 322-23 (noting that corporate defendants do not comprise the majority of the slavery market).

198 This point is made by reparations critic Olson. *See* Olson, *supra* note 94, at 2-3. This point is also brought up in a discussion of wrongdoer attenuation. *See* Wenger, *supra* note 109, at 296-301.

199 *See* BROOKS, *supra* note 16, at 140.

200 As noted above, some of these problems were caused by the lawsuit being brought too soon. "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." BROPHY, *supra* note 1, at 124-25. *See supra* text Part III.D (discussing the *Slave Descendants* court's analysis).

201 *See supra* text Part III.B. (discussing the legal narrative and the role of lawsuits in changing public opinion).

202 *See supra* notes 113-14 and accompanying text (explaining the role of lawsuits in shaping public opinion about Japanese-Americans).

liberal antiracist ideals. The moral force of slavery claims in the abstract is undisputed, with near-universal condemnation of overtly racist past acts.[203] Even reparations opponents almost invariably agree that slavery was a terrible initial harm.[204]

On the other hand, many Americans believe that the book is closed – they have long-formed opinions about Blacks, and are uninterested in hearing more about slavery.[205] As Roy Brooks notes, "[w]hites 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."[206] This reflects in part the problem of interest convergence, that "[t]he interest of blacks in achieving racial equality will be accommodated only when it converges with the interest of whites."[207]

Modern racism is often unconscious rather than overt.[208] Without the easy external racist markers of earlier eras, it is easy for Americans to ignore the issue.[209] Problems such as disparate resource allocation can be

[203] *See, e.g.*, Magee, *supra* note 9, at 879 (citing an objecting statement of Rep. Sessenbrenner, which begins, "there's no more detestable institution than slavery, but . . ."); *see also id.* at 915 (noting that overt racism is "deplored as anathema").

[204] For instance, the *Slave Descendants* opinion clearly condemned slavery and recognized that slaves had been greatly harmed. *See* In Re African-American Slave Descendants Litigation, 304 F.Supp.2d at 1034-38 (N.D. Ill. 2004). The Court concluded 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).

[205] Ariela Gross, *When Is the Time of Slavery? The History of Slavery in Contemporary Legal and Political Argument*, 96 CALIF. L. REV. 283, 284–87 (2008) (discussing different views about the history of slavery in America); Wenger, *supra* note 147, at 222-25 (discussing how this disparity undercuts support for reparations); *see generally* BROPHY, *supra* note 1, at 4-5 (discussing public attitudes towards reparations); Taunya Lovell Banks, *Exploring White Resistance to Racial Reconciliation in the United States*, 55 RUTGERS L. REV. 903, 912-18, 945 (2003).

[206] BROOKS, *supra* note 16, at 150. As one reporter describes the problem, "opponents say there is no precedent for paying people who are dead, that reparations are usually awarded to survivors." Kevin Merida, *"Did Freedom Alone Pay a Nation's Debt? Rep. John Conyers Jr. Has a Question. He's Willing to Wait a Long Time for the Answer,"* WASH. 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*, WALL ST. J., Apr. 14, 2002.

[207] Bell, *supra* note 142, at 523 (suggesting the interest of Blacks in achieving racial equality will be accommodated only when it converges with whites' interest); *cf.* Richard Delgado, *The Imperial Scholar*, 132 U. PA. L. REV. 561, 567 (1984) (stating that "[whites] may pull their punches with respect to remedies, especially where remedying [Blacks'] situation entails uncomfortable consequences for [whites]").

Because of interest convergence, Blacks are most likely to be politically successful when they can convince whites that their political interests are aligned. *See generally* Wenger, *supra* note 147, at 219 (discussing interest convergence in the reparations context).

[208] *See generally* Charles Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

[209] *See* Brooks, *supra* note 84, at 10-13, 37-62 (discussing ongoing struggles in the Black

invisible.[210] Not surprisingly, polls show that only 5% of whites support reparations.[211] And in fact, there is an active anti-reparations movement among white Americans.[212] Reparations will only become feasible when a large number of white Americans believe that it is in their best interest.[213] 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.[214] More alarming is the idea that reparation has failed to catch on among many moderates and progressives.

The legal narrative sought to bridge this gap, but failed. Advocates used lawsuits to draw attention to continuing harm suffered by Blacks.[215] However, the discussion did not convince the courts. As previously noted, the lawsuits failed to show the necessary legal links between past harms and modern claims. The lawsuits were also ineffective at altering existing skepticism and raising consciousness about links between slavery and its current effects in the Black community. Although the Tulsa race riot has raised some level of consciousness, it has not raised enough to galvanize support for reparations. Even worse, the court's own skeptical analysis entered the discussion, and helped to reinforce the original anti-reparations criticism and skepticism. Advocates had inadvertently helped a new skeptical voice enter the narrative, thereby undercutting the broader public discussion.[216]

community).

210 *See id.* at 125-82 (providing extensive charts illustrating demographic gaps between racial groups in wealth, education, crime, and many other areas). As Brooks demonstrates, "race still matters in post-civil rights America." *Id.* at 113.

211 *See* BROPHY, *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 206, at 915-19; Michael Kranish, *Blacks Rally on Capital for Slavery Reparations: Farrakhan Seeks Transfer of Land*, BOSTON GLOBE, Aug. 18, 2002, at A3. 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." BROPHY, *supra* note 1, at 4-5. *See* Lee A. Harris, *"Reparations" as a Dirty Word: The Norm Against Slavery Reparations*, 33 U. MEM. L. REV. 409, 410 n.9.

212 *See* HENRY, *supra* note 1, at 93-122 (discussing the development of the anti-reparations movement).

213 *See* Magee, *supra* note 9, at 910. "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.... [T]he 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.* at 910-11. In addition, American beliefs about individualism mean that whites generally do not see themselves as a privileged racialized group. *See* Banks, *supra* note 206.

214 *See* Brophy, *supra* note 211 (noting that the nature of reparations are controversial); *see also* BROPHY, *supra* note 1, at 86-92 (analyzing the debate over reparations).

215 *See* BROPHY, *supra* note 1, at 129 (discussing continuing violation arguments).

216 That is, people may believe that if there is not a legal remedy, there was no real injury. *See* Marc Galanter, *The Dialectic of Injury and Remedy*, 44 Loyola L.A. L. Rev. 1 (2010) (discussing how injury and remedy can be mutually constitutive); Wenger, supra note 147, at 194, 206-07 (same); *cf.*

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, but rather groups such as Holocaust victims, Japanese Americans, and even tobacco smokers.[217] This may have been a reasonable compromise given the law's historic hostility to claims brought by Blacks, but the colorblind claim also failed.[218] In addition, the colorblind approach undermined the victims' moral claims. A colorblind approach can address only overt racism, but does nothing to address the underlying racial hierarchy.[219] The racialized harm of slavery can only be addressed by explicitly recognizing (and undermining) the links between race and oppression.[220]

B. Re-evaluating Reparations Narratives

Lawsuit failure forced advocates to discard a model which, while intriguing, was flawed in significant ways. This provided 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 movement's goals more broadly.[221]

The rise and fall of the legal reparations narrative illustrates some of the limits of practical reparations approaches. The lawsuits carefully framed limited claims in legal terms, in order to use the tort model. Despite such compromises, courts were still unwilling to accept the idea of reparations. It may be impossible to shoehorn the racial justice questions of reparations into the narrow legal box of tort doctrine. Matsuda suggested that

David M. Engel & Michael McCann, *Tort Law as Cultural Practice*, *in* Fault Lines: Tort Law as Cultural Practice 1-3 (2009) (discussing how tort law reflects cultural views).

217 *See, e.g.*, Wenger, *supra* note 109, at 285, 304-05 (noting litigation precedents); BROPHY, *supra* note 1, at 45-46 (analyzing international examples of reparations).

218 *Cf.* Matsuda, *supra* note 48, at 374-76 (discussing the law's hostility to claims from powerless classes).

219 *See supra* note 56 and accompanying text (discussing critical race theory critique of the colorblind approach).

220 *See, e.g.*, Robinson, *supra* note 60, at 214-19, 227-30 (noting that blacks are more likely to be incarcerated and hold lower level jobs); *see also supra* notes 32-38 (discussing James Forman's critique).

221 *See* Eric Yamamoto et al., *American Reparations Theory and Practice at the Crossroads*, 44 CAL. W. L. REV. 1 (2007) (discussing how deep wounds of social injustice sometimes persist over generations); *cf.* BROPHY, *supra* note 1, at 168 (stating goals of reparations).

reparations were not attainable in existing legal framework.[222] Reparations lawsuits challenged that idea – but Matsuda was right, tort law simply does not fit.[223] Tort law's focus on individual injury cannot account for group harms, or reflect the ways in which people interact in an interconnected web.[224]

The court decisions illustrate the boundaries of the legal system. Courts are not designed to address tort damages without individual causation. Reparations advocates cannot further narrow their claims; and even if they could, it is not clear that any kind of reparations claim can prevail in court. Tort lawsuits represented reparations at some of their most practical points, yet they were still insufficiently practical for the mainstream legal system.

In addition, the tort framework sapped some of the moral force out 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.[225] By entering the legal arena, reparationists were bound by ill-fitting legal formalities, which were not designed to help oppressed parties, but rather to maintain the position of the powerful.[226] That system and its legal fictions allowed the *Slave Descendants* court to conclude, paradoxically, "slavery was terrible . . . sorry, no recovery."[227]

The failure of reparations lawsuits should not lead advocates to abandon the practical reparations strand entirely. Rather, lawsuit failure calls for a recalibration of sorts. As suggested earlier, both strands of reparations

222 *See* Matsuda, *supra* note 48, at 397-98 (noting problems with attaining reparations outside of a critical framework); Wenger, *supra* note 147, at 196-205 (discussing how reparations claims do not fit well into law).

223 *See id.* (describing the difficulty within the current legal system of granting reparations based on group harms); *see also* Wenger, *supra* note 109, at 284, 292 (noting the difficulty of reparations claims in the tort context). Wenger, *supra* note 147, at 196-215 (same).

224 *See* Dayna Nadine Scott, *Body Polluted: Questions of Scale, Gender, and Remedy,* 44 Loyola L.A. L. Rev. 121, 139-47.

225 *See* Wenger, *supra* note 109, at 281 (stating that the attenuated nature of harm in reparations cases makes showing both but-for cause and proximate cause, as required by tort law, very difficult); *see also* Mari Matsuda, *On Causation*, 100 COLUM. L. REV. 2195, 2200–16 (2000) (explaining old and new understandings about causation and stating that some injuries are far too remote for the law to allow a remedy).

226 *See* Matsuda, *supra* note 48, at 379 ("Members of the dominant class continue to benefit from the wrongs of the past and the presumptions of inferiority imposed upon victims."); *see also* Peggy Davis, *Law as Microaggression*, 98 YALE L.J. 1559, 1570 (1989) (noting how Blacks receive messages of subordination and inferiority when their views are disregarded, eroding their confidence in the legal system); Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals From Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 417 (1987) ("The legal system did not provide blacks with structured expectations, promises, or reasonable reliances of any sort.").

227 In re African-American Slave Descendants Litigation, 304 F.Supp.2d 1027 (N.D. Ill. 2004) (holding that although slavery was terrible, plaintiffs were unable to recover); *see* Magee, *supra* note 9, at 914 ("[D]espite clear evidence of injury . . . legal institutions fail to take responsibility[.]").

dialogue can play important roles.[228] The legal framing had many effects on the discussion, and some of these may be worth keeping.

Lawsuits provided cohesion for the movement – but 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. Conversely, it is also 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 sapped broader dialogue focused on more creative remedies. Finally, legal framing may have privileged particular adversarial conversations, thus contributing to the highly polarized nature of the reparations discourse.

Without the possibility of legal recovery, there is no reason to retain the quirky rules and conceptual cul-de-sacs that the lawsuit model imposes. These include lawsuits' artificial sole focus on corporations, as well as legal doctrines such as unjust enrichment which lack moral force. If the master's tools cannot be used to dismantle the master's house,[229] there is little use in keeping them around. Advocates should also reject the implied colorblind aspects of the lawsuit approach, and instead, re-race reparations. Reparations lawsuits inadvertently sidelined the racial nature of reparations, but without legal success, consequently de-racing reparations for the proverbial mess of pottage.[230] Slavery creates 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 open new paths going forward.[231]

V. REPARATIONS, RHETORIC, AND REVOLUTION: REBUILDING REPARATIONS NARRATIVES

It is now certain that reparations will not follow the lawsuit to settlement path of other groups, such as Holocaust survivors and Japanese-Americans.

228 *Cf.* Matsuda, *supra* note 47, at 398 (noting the use of both critical and liberal arguments).

229 See Magee, *supra* note 9, at *CITE (discussing the master's tools metaphor); Audre Lorde, *The Master's Tools Will Never Dismantle the Master's House*, *in* Audre Lorde, Sister Outsider (1984).

230 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). "[A]nd 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[.]" *Id.*

231 *Cf.* Matsuda, *supra* note 48, at 352–53 (pointing out that there are benefits to a united front, but also benefits to having many different approaches); Aiyetoro, *supra* note 40, at 140 (suggesting that the *Cato* loss was a boon for reparations advocates, because it provided a roadmap for future strategy).

Reparations advocates will need to break new ground in order to succeed. Notably, this is hardly unusual, for each of the mass restitution groups that received reparations broke new ground in one way or another. Admittedly, only a few such groups had barriers quite as high as reparationists now face, but all restitution claims have been difficult. Legal failure itself is a minor setback. In fact, lawsuits failed for other groups, such as Japanese-Americans, who ultimately did receive restitution.[232] The continuing gap in political progress is a bigger concern. The role of new reparations narratives will be to bridge that gap, and thereby alter public perception by making the moral case for reparations through these narratives. Indeed, reparations claims are strongest in the moral arena, not in the courtroom.

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, as it further eroded Black trust in the legal system.[233]

Radical resurgence is a necessary corrective. Reparations' roots lie in revolution and radical challenge to racism. Reviving radical reparations means that reparationists should "think big" and bring back the grandeur of radical reparations.[234] Now that the artificial constraints of lawsuits are gone, reparationists should think creatively about ways to combat white privilege.[235] Early civil rights cases involved sweeping equitable remedies and structural injunctions. Reparations could implement similar tactics, such as reenergizing affirmative action, or partnering with advocates in others areas of law to fight racial subordination.

232 *See* Magee, *supra* note 9, at 904 (noting that the Supreme Court declined to grant reparations for Japanese-American survivors of World War II internment camps in *United States v. Hohri*).

233 *See* Roy L. Brooks, *Rehabilitative Reparations for the Judicial Process*, 58 N.Y.U. ANN. SURV. AM. L. 475 (2003) (discussing Black distrust of the judicial system); *see also* Wenger, *supra* note 81, at 240–41 (stating that the breached Rule of Law caused by slavery resulted in resentment and distrust of law within the black community).

234 *See* Brooks, *supra* note 70, at 740 (suggesting that reparationists should think big).

235 *See* Manning Marable, *Along the Color Line: In Defense of Black Reparations*, Nov. 11, 2002, http://www.zcommunications.org/contents/29065 (suggesting that reparations are part of a movement for ending white privilege); *cf.* BROPHY, *supra* note 1, at 71-72 (discussing Marable's argument and questioning the value of white privilege for whites living in poverty or who have no college education).

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. However, 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 that fit relatively well into existing social structures. Excessive practicality is problematic, however, because too narrow of a focus on practical arguments can strip reparations claims of their moral force. Reparations claims must remain connected to the racial roots of slavery and focus on fundamental issues of justice, not legal technicalities. 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."[236] With the goal of balancing the strengths of both radical and practical approaches to reparations, I will set out a few ideas for moving forward while drawing on the strengths of each facet.

a. Storytelling

As I have written elsewhere,[237] one promising approach is storytelling. Most Americans believe, albeit incorrectly, that they have a good understanding of the history of slavery, and of race issues in general.[238] This faulty belief can be challenged by storytelling that contradicts the popular consciousness.[239]

Such storytelling worked very effectively for Japanese-Americans, as eye-opening accounts of veterans and wrongful convictions caught the public's attention.[240] Slave reparations must use this tactic of attacking

236 Brooks, *supra* note 70, at 741.

237 Wenger, supra note 147.

238 Wenger, supra note 147, at 222-23.

239 Richard Delgado notes that "[s]tories, 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." Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2413 (1989).

240 Wenger, *supra note* 143, at 222.

myths, including the beliefs that slavery was limited to the South, that it cleanly ended in 1865, and 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."[241]

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."[242] Storytelling illuminates the North's ties to slavery, as well as the common use of slaves in industrial work, such as building and maintaining railroads.[243] Storytelling combats the perception that slavery's impact was limited and regional, and that only a small number of Southern whites benefited from slavery.[244] It affirms the abolitionist refrain that slavery was built upon an "unholy alliance . . . between the lords of the lash and lords of the loom" – that is, slave owners and Northern textile manufacturers.[245] In addition, storytelling raises consciousness about horrific and little-known massacres like Tulsa.

Truth commissions can "lay the groundwork for a national consensus on reparations and also serve a cathartic purpose, which would offer emotional closure for victims."[246] The state commission in Tulsa led to official storytelling and unprecedented acceptance of blame.[247] Thus, despite the

241 BROOKS, *supra* note 16, at 148.

242 *Advocates Quietly Push for Slavery Repayment*, USA TODAY, July 9, 2006 (quoting white filmmaker Katrina Browne); *see* Traces of the Trade – Synopsis, http://www.tracesofthetrade.org /synopsis ("Over the generations, the family transported more than ten thousand enslaved Africans across the Middle Passage. 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 the DeWolfs were one of only a few 'slaving' dynasties, the network of commercial activities that they were tied to involved an enormous portion of the Northern population. Many citizens, for example, would buy shares in slave ships in order to make a profit.").

243 *See* Theodore Kornweibel, Jr., *Proceedings of the Scholarly Conference Taking Reparations Seriously: Reparations and Railroads*, 29 T. JEFFERSON L. REV. 219, 221-26 (2007) (explaining that plantation slaves were often rented out for railroad or other industrial labor, and that in comparison to plantation work, "by every criterion, railroad slavery was worse").

244 *See, e.g.*, DAVID HOROWITZ, UNCIVIL WARS 81 (2003) (arguing that not all whites benefitted from slavery by asking, "[d]id 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?").

245 *See* DAVID HERBERT DONALD, CHARLES SUMNER AND THE COMING OF THE CIVIL WAR 140 (1960).

246 Brophy, *supra* note 118, at 537; *see* BROPHY, *supra* note 1, at 170 (examining truth commissions).

247 *See* Miller, *supra* note 103, at 60-65 (discussing Tulsa).

lawsuit dismissal, Tulsa is a kind of reparations success story,[248] laying a foundation for future actions. As Roy Brooks suggests in *Atonement and Forgiveness*, storytelling "provides the factual foundation for apology."[249]

Storytelling blends both radical and practical elements. It is radical in that 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.[250] It is practical in that it fits in existing legal structures. This is especially important because, unlike some racial remedies, storytelling is not limited by current constitutional jurisprudence.[251]

b. Microreparations

Also of note is the growing movement for microreparations. Different varieties of localized reparations programs have become increasingly popular.[252] Brophy has charted the striking increase in these reparations programs over the past ten years.[253] The public distrust of broad-scale reparations has not harmed the popularity of microreparations, which today signify a rare bright spot for reparationists. Microreparations blend the two strands of reparations; they are practical in their fit into existing law, while they also have radical effects.

Microreparations success also illustrates the consciousness-raising of the lawsuits. And microreparations ordinances may provide opportunities 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 their past ties to slavery.[254] Reparations advocates can use these ordinances as a platform by bringing litigation or other actions to enforce them. They can call public attention to reparations without seeming self-serving, and can highlight the many lesser-known links to slavery.

248 *See* Wenger, *supra* note 147, at 225 (suggesting that taken as a whole, Tulsa "is a reparations success story").

249 BROOKS, *supra* note 16, at 148.

250 *See* Delgado, *supra* note 240, at 2413; *see also* Richard Delgado, *When a Story is Just a Story: Does Voice Really Matter?*, 76 VA. L. REV. 95 (1990).

251 *Cf.* BROPHY, *supra* note 1, at 158-64 (discussing constitutionality of reparations); Wenger, *supra* note 147, at 226 (noting that there is no constitutional limit on storytelling).

252 *See* Kaimipono David Wenger, Towards Microreparations (draft, on file with author); Wenger, *supra* note 147, at 227 (discussing microreparations).

253 *See* BROPHY, *supra* note 1, at 30-32. Surprisingly, Brophy gives this topic relatively little further analysis.

254 *See id.* at 50-52 (citing various universities, the state of California, and the city of Chicago as examples where past ties to slavery have been disclosed).

Other sorts of rights may provide the context for storytelling and public consciousness-raising about slavery. For instance, Brophy has recently written about the right to access graveyards.[255] 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.[256]

Microreparations can build on and interact with intermediate steps, such as apology, affirmative action, and commemorative events.[257] Society already engages in periodic discussion of racial ideas, such as during Black History Month and on Martin Luther King Day. Microreparations efforts can build on existing building blocks.

c. Moral and Restorative Framing

In addition, reparations advocates can draw on moral and restorative frameworks. One important idea here is the concept of restorative justice, which is drawn from human rights law. Restorative justice is "focused on attempting to make the victim and society whole."[258] It "tends to be community-oriented, 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."[259]

255 *See id.* at 133 (discussing the potential for symbolic relief for slaves' defendants from being able to gain access to plantations where their ancestors are buried); *see also* Alfred Brophy, *Grave Matters: The Ancient Rights of the Graveyard*, 2006 B.Y.U. L. REV. 1469 (noting the conflict between the right to worship at the graves of ancestors and the right to exclude people from private property).

256 *See* BROPHY, *supra* note 1, at 134 (detailing the riots in St. Louis).

257 *Cf.* Kaimipono David Wenger, *Apology Lite: Truths, Doubts, and Reconciliations in the Senate's Guarded Apology for Slavery*, 42 CONN. L. REV. 1 (2009) (discussing the Senate's apology concerning slavery, and whether a stand-alone apology can ever be a valid form of reparation).

258 Linda M. Keller, *Seeking Justice at the International Criminal Court: Victims' Reparations*, 29 T. JEFFERSON L. REV. 189, 191-92 (2007) (describing restorative justice and how it can influence both the victim and society as a whole); *see* BROOKS, *supra* note 16, at 141 (noting that racial reconciliation will rely on restorative justice ideas).

259 Keller, *supra* note 258, at 190 (contrasting restorative and retributive justice); *see* 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 258, at 211 n.107, 217 (discussing methods of disbursing of awards). *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 (reviewing the literature on the varied arenas in which restorative justice is theorized and practiced); Michael F. Blevins, *Restorative Justice, Slavery, and the American Soul: A Policy-Oriented Intercultural Human Rights Approach to the Question of Reparations*, 31 T. Marshall L. Rev. 253, 290-93 (2006).

Another promising option is Ho'oponopono, the traditional Hawaiian concept of reconciliation among members of a family or community. *See* Wenger, *supra* note 147, at 229-30 (discussing ho'oponopono in the reparations context); *see also* Rebecca Tsosie, *Sacred Obligations: Intercultural Justice and the Discourse of Treaty Rights*, 47 UCLA L. REV. 1615, 1666-67 (2000) (discussing the concept of

Another option is the moral approach of atonement suggested by Roy Brooks.[260] The idea of atonement originates in the religious context, and signifies a reconciliation or setting straight of records.[261] It also implies an expiatory act, which is designed to heal harms done in the past. As in the religious context, reparations for slavery would involve a sacrifice designed to show contrition, and to cleanse and make the community whole.[262] The atonement approach is one of treating all individuals as community members who have been harmed by the racism that is an ongoing legacy of slavery.[263] Atonement requires not simply monetary payments, but also the moral gesture of apology.[264] Brooks writes that "atonement – apology and reparations – plus forgiveness leads to racial reconciliation."[265] The idea of atonement can fit into existing law, but it involves a radical re-envisioning of the moral framework of reparations.

Ideas like storytelling, microreparations, restorative justice, and atonement draw on both the practical and radical sides of reparations discourse. They blend well with the results-oriented focus of practical reparations, but as consciousness-raising tools they can be quite radical in their ultimate effects.

CONCLUSION

The intellectual history of reparations argument shows the ways that advocates have framed the idea over time. The discourse reflects shifts in the goals of the reparations movement, 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. Moving forward will ultimately require strategies that can build on both practical and radical approaches to reparations.

Ho'oponopono within the context of the illegality of the taking of Hawaii).

260 *See* BROOKS, *supra* note 16, at 143-47, 165-69. Brooks pointedly disavows the debt analogy espoused by advocates like Randall Robinson. *See id.* at 14, 138-43. Brooks' approach is one of moral reflection, rather than one opposed to political confrontation. *See* BROPHY, *supra* note 1, at 73.

261 *See* BROOKS, *supra* note 16, at 141 (discussing atonement).

262 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; Wenger, supra note 147, at 228n.300 (discussing the history of the concept of atonement).

263 *See* Wenger, *supra* note 81, at 241-44 (explaining how emancipation, while beneficial to those freed, does not constitute takings compensation because emancipation itself provided no monetary relief).

264 *See* BROOKS, *supra* note 16, at 141 (discussing atonement); *see also* Jason Solomon, *What is Civil Justice?*, 44 Loyola L.A. L. Rev. 333-36 (2010) (discussing the moral force of apology).

265 BROOKS, *supra* note 16, at 143, 148 (discussing reparations as a chance to clarify the historical record).