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GETTING REPARATIONS FOR SLAVERY RIGHT—A RESPONSE TO POSNER AND VERMEULE

Roy L. Brooks*

INTRODUCTION

In their essay, *Reparations for Slavery and Other Historical Injustices*,¹ Eric Posner and Adrian Vermeule (hereinafter referred to as “the authors”) set out to “provide an overview of the conceptual, legal, and moral issues surrounding reparations.”² Their main critical thrust is to fill what they perceive to be “large gaps in the literature”³ on reparations and, thus, “to provide an accurate map of the intellectual terrain.”⁴ Although the authors make some interesting points⁵ and, I very much want to believe, bring to the table a welcome degree of openness and objectivity often missing in legal scholarship,⁶ they fall

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

2 *Id.* at 689.

3 *Id.*

4 *Id.* at 689, 747.

5 See *infra* note 168 and accompanying text for a discussion of some of the interesting points the authors make. Yet, the authors also raise some absurd points; for example, that the outcome of the reparations (or redress) debate depends in large part on a calculation of the “the harm whites did to blacks” (in other words, “the guilt of whites”), Posner & Vermeule, *supra* note 1, at 708, when in fact the whites who participated in the institution of slavery are all dead, and today’s whites simply have had nothing to do with slavery. The only living entities that are guilty of slavery, and, hence, can be held legally or morally responsible, are governments (federal and state) and corporations. And so it only makes sense to talk about the guilt of these entities. Today’s whites do, however, have a role to play in redressing slavery. They can and should support redress efforts not because of “white guilt,” but because of civic duty. See *infra* text accompanying notes 153–55.

6 The authors say that they are “less concerned with attacking or defending particular reparations proposals than with illuminating the relevant ethical, legal, and institutional problems.” Posner & Vermeule, *supra* note 1, at 746. However, a critical theorist would certainly challenge the authors’ professed objectivity by pointing to the essay’s hegemonic character. A critical theorist—whether a structuralist, see, e.g., Robert W. Gordon, *Unfreezing Legal Reality: Critical Approaches to Law*, 15 FLA. ST. U. L. REV.

far short of their stated objectives. The authors are thwarted most particularly by their limited readings and dearth of knowledge about a very complex and fast-moving subject.⁷

195 (1987); *but see* Richard Delgado, *Crossroads and Blind Alleys: A Critical Examination of Recent Writing About Race*, 82 TEX. L. REV. 121, 123–24 (2003) (suggesting that structuralists, or what Delgado calls “realists,” would not be less concerned with hegemonies than with hegemony), or a postmodernist, *see, e.g.*, MICHEL FOUCAULT, *MADNESS AND CIVILIZATION: A HISTORY OF INSANITY IN THE AGE OF REASON* (Richard Howard trans., Pantheon Books 1965) (1961); DOUGLAS E. LITOWITZ, *POSTMODERN PHILOSOPHY AND LAW* (1997), whether a proponent of Critical Legal Studies, *see, e.g.*, DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION: FIN DE SIÈCLE* (1997); Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369 (1982), or Critical Race Theory (at least its “idealist,” or postmodern, side, *see, e.g.*, *CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY* (Francisco Valdes et al. eds., 2002)), or an adherent of Critical Feminist Theory, *see, e.g.*, Virginia Valian, *The Cognitive Bases of Gender Bias*, 65 BROOK. L. REV. 1037 (1999), or Critical Race Feminism, *see, e.g.*, *CRITICAL RACE FEMINISM: A READER* (Adrien Katherine Wing ed., 1997); BELL HOOKS, *AIN’T I A WOMAN: BLACK WOMEN AND FEMINISM* (1981)—would argue that the authors’ failure to engage readily available scholarship on reparations written by scholars of color, *see infra* note 7, harkens back to an article written some fifteen years ago by the father of one of the authors. In 1990, Judge Richard A. Posner wrote an article that criticized black scholarship and Critical Race Theory in particular on grounds that such writings lacked intellectual rigor and value. *See* Richard A. Posner, *Duncan Kennedy on Affirmative Action*, 1990 DUKE L.J. 1157, 1161. The late Jerome Culp wrote a response article correctly pointing out that the elder Posner was criticizing a school of thought without having engaged the scholarship. Jerome McCristal Culp, Jr., *Posner on Duncan Kennedy and Racial Difference: White Authority in the Legal Academy*, 41 DUKE L.J. 1095 (1992). Culp accused Posner of being a “racist” for insisting on white intellectual hegemony within the legal academy: “He demands the authority to decide, to be the white power in the legal academy. It is this demand, this assertion of pure . . . white supremacy, that black scholars must reject in the claims of their colleagues.” *Id.* at 1113–14. Culp sought to “emphasize that black scholars should reject the claims obliquely made by Judge Posner about them and their scholarship and that nonblack scholars ought to take care not to perpetuate similar efforts at white authority in different contexts.” *Id.* at 1097. Black scholars have contributed a great deal to the scholarship on slave redress, and to that extent Posner-the-son can be viewed as criticizing the latest demonstration of black scholarship just as Posner-the-father did in 1990. Like father like son. But I do not take this path. In my view, it is not necessary to go that far in criticizing the authors’ essay. Their essay simply represents bad scholarship when measured by the traditional criteria of what constitutes good scholarship. For that reason alone the essay, in my view, warrants a critical response. My concern is that the authors’ essay will surely misinform the uninitiated who may have entered the reparations debate through the portal of this prominently placed piece.

7 Though the authors refer to my anthology several times, *WHEN SORRY ISN’T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE* (Roy L. Brooks ed., 1999) [hereinafter *WHEN SORRY ISN’T ENOUGH*], and cite (albeit just once in passing) RUDI G. TEITEL, *TRANSITIONAL JUSTICE* (2000), they do not cite, let alone discuss, any of the other major works on reparations written in the five years

New scholars in the field, the authors commit several serious conceptual errors, which render their treatment of the subject incomplete and incorrect. Chiefly, they construct a concept of “reparations” that misdescribes,⁸ omit important historical events that greatly inform the moral debate,⁹ pay little attention to a basic distinction in the forms of redress,¹⁰ and completely overlook basic conceptual schemes and their concomitant normative stances that give shape to the debate.¹¹ Because of their analytic flaws and lack of knowledge, the authors come to a conclusion¹² that has, in fact, been rejected on grounds of “both logic[] and effective[ness]”¹³ by successful redress movements around the world¹⁴ and in the United States.¹⁵

In elaborating on these points, I shall continue the practice of using the term “redress” rather than the term “reparations” when re-

preceding their essay, *especially*, ELAZAR BARKAN, *THE GUILT OF NATIONS: RESTITUTION AND NEGOTIATING HISTORICAL INJUSTICES* (2000); JOE R. FEAGIN, *RACIST AMERICA: ROOTS, CURRENT REALITIES, AND FUTURE REPARATIONS* (2000); PRISCILLA B. HAYNER, *UNSPEAKABLE TRUTHS: FACING THE CHALLENGE OF TRUTH COMMISSIONS* (2002); MICHAEL HENDERSON, *FORGIVENESS: BREAKING THE CHAIN OF HATE* (2d rev. ed. 2003); *HUMAN RIGHTS IN DEVELOPMENT: YEARBOOK 2001* (George Ulrich & Louise Krabbe Boserup eds., 2003); *POLITICS AND THE PAST: ON REPAIRING HISTORICAL INJUSTICES* (John Torpey ed., 2003); *RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT* (Eric K. Yamamoto et al. eds., 2001); *SHOULD AMERICA PAY? SLAVERY AND THE RAGING DEBATE ON REPARATIONS* (Raymond A. Winbush ed., 2003) [hereinafter *SHOULD AMERICA PAY?*]; DESMOND MPIOLO TUTU, *NO FUTURE WITHOUT FORGIVENESS* (1999); Mark Gibney & Erik Roxstrom, *The Status of State Apologies*, 23 *HUM. RTS. Q.* 911 (2001); Comment, *Reparations for Slavery: A Dream Deferred*, 3 *SAN DIEGO INT’L L.J.* 177 (2002); Anthony J. Sebok, *Prosaic Justice*, *LEGAL AFF.*, Sept.–Oct. 2002, at 51 [hereinafter Sebok, *Prosaic Justice*]; Anthony J. Sebok, *The Brooklyn Slavery Class Action: More Than Just a Political Gambit*, *FINDLAW*, Apr. 9, 2002, at <http://writ.news.findlaw.com/sebok/20020409.html> [hereinafter Sebok, *Brooklyn Slavery Class Action*]. The student comment, written by Watson Branch, was first-rate and helped to generate interest in an Association of American Law Schools (AALS) panel discussion on reparations held in January 2003. I was a member of the panel convened by the Remedies Section. At that session, a young scholar from the University of Michigan Law School, Hanoch Dagan, offered an innovative and insightful analysis of the legal possibilities for reparations, answering many of the questions raised by Sebok in *Prosaic Justice*, *supra*. See Hanoch Dagan, *The Law and Ethics of Restitution* (Dec. 30, 2002) (unpublished manuscript, on file with author). Unless the authors were in attendance, I would not expect them to have known about this analysis.

8 See *infra* Part I.A.

9 See *infra* Part II.

10 See *infra* Part III.

11 See *infra* Part IV.

12 See *infra* text accompanying note 192.

13 See *infra* text accompanying notes 197–98.

14 See *infra* text accompanying notes 195–96.

15 See *infra* text accompanying note 197.

ferring to the range of responses governments have made (or have been urged to make) regarding their past atrocities.¹⁶ Providing reparations is merely one way in which the perpetrator of an atrocity can provide redress. It is not the only way. Because the authors fail to recognize this distinction between redress and reparations, their use of the latter term is over-inclusive.¹⁷

After summarizing the authors' major arguments in Part I, I shall in Part II highlight several key events in the history of the Black Redress Movement—the orchestrated attempt to seek redress for chattel slavery and Jim Crow (hereinafter “slave redress”). I will argue that the ex-slaves' timely and persistent attempts to seek redress from the federal government (ending in the early 1930s) and the demise of Jim Crow only a generation ago (ending in the early 1970s) give additional moral weight to the claim for slave redress. In Part III, I review the forms of redress, and also point out basic distinctions the authors miss. Part IV discusses two competing redress models that have emerged in recent years. The authors' analysis misses this important distinction and, consequently, overlooks the compelling argument that rests slave redress not on “backward-looking grounds of corrective justice,” on which the authors focus,¹⁸ but on forward-looking theories of *racial reconciliation and moral restoration*.

I. THE AUTHORS' ACCOUNT

A. *What Is a Reparation?*

The authors begin inauspiciously with a failed attempt to construct a new definition of reparations in lieu of using the more nuanced version developed in over fifty years of trial and error.¹⁹ They define reparations as

schemes that (1) provide payment (in cash or in kind) to a large group of claimants, (2) on the basis of wrongs that were substantially permissible under the prevailing law when committed, (3) in

16 See *infra* text accompanying notes 197–98. For a definition of the term “atrocity,” see *infra* text accompanying note 21.

17 See *infra* text accompanying notes 18–28.

18 See Posner & Vermeule, *supra* note 1, at 691–92.

19 See, e.g., Roy L. Brooks, *The Age of Apology*, in *WHEN SORRY ISN'T ENOUGH*, *supra* note 7, at 3, 8 (“Responses [from a government] that seek atonement for the commission of an injustice are properly called *reparations*.”). This definition is based on the way in which governments and victims have argued over redress in this post-Holocaust era. See *infra* text accompanying notes 79–80. The definition has undergone some refinement in recent years but retains its essential redemptive feature. See *infra* text accompanying notes 118–19.

which current law bars a compulsory remedy for the past wrong (by virtue of sovereign immunity, statutes of limitations, or similar rules), and (4) in which the payment is justified on backward-looking grounds of corrective justice, rather than forward-looking grounds such as deterrence of future wrongdoing.²⁰

This definition is problematic for several reasons. First, it is over-inclusive. As used in international and domestic redress movements, reparations do not simply apply to “wrongs” or wrongs involving “a large group of claimants.” They apply only to certain types of wrongs, to wit, gross violations of fundamental international human rights, such as slavery, genocide, and Apartheid.²¹ These wrongs invoke greater moral outrage and, thankfully, happen less frequently than, say, mass torts, which also involve “a large group of claimants,” or even everyday incidents of racial or gender discrimination in American society. Reparations, in short, characteristically arise only in the context of an atrocity.

While it may be possible, as the authors maintain, to justify reparations on “backward-looking grounds of corrective justice,”²² they are more usually justified on stronger, forward-looking grounds of restorative justice, specifically reconciliation and redemption.²³ Properly conceived, reparations are connected to a statement of deep remorse from the perpetrator. They are, indeed, a redemptive response to an atrocity. This is serious business because it signals the perpetrators’ readiness to imbibe a spirit of heightened morality, identity, egalitarianism, and restorative justice—a vision that gained international acceptance in the years following the Holocaust.²⁴

20 Posner & Vermeule, *supra* note 1, at 691.

21 See, e.g., sources cited *supra* note 6; see also, Brooks, *supra* note 19, at 7–8 (discussing several international conventions from which the basic idea is taken). Every wrong that is the subject of redress discourse involves nothing less than an atrocity. See, e.g., sources cited *supra* note 7.

22 Posner & Vermeule, *supra* note 1, at 691.

23 See *infra* text accompanying notes 108–15; see also Nell Jessup Newton, *Indian Claims for Reparations, Compensation, and Restitution in the United States Legal System*, in *WHEN SORRY ISN’T ENOUGH*, *supra* note 7, at 261, 262–65 (discussing the Indian Claims Commission Act and its effectiveness in addressing both future and past claims of Native Americans); George Ulrich, *The Moral Case for Reparations: Three Theses about Reparations for Past Wrongs*, in *HUMAN RIGHTS IN DEVELOPMENT*, *supra* note 7, at 369, 377–79 (comparing the non-subordination principle and colorblind principle). Whether justified on backward- or forward-looking grounds, redress will hopefully help to deter future wrongdoing.

24 See, e.g., Alexander Boraine, *Alternatives and Adjuncts to Criminal Prosecutions*, in *WHEN SORRY ISN’T ENOUGH*, *supra* note 7, at 469, 469 (discussing the “compelling need to restore the moral order”); Newton, *supra* note 23, at 262 (discussing how the post-World War II spirit of “egalitarianism and visions of restorative justice” dramati-

Hence, perpetrators do not give out reparations easily, preferring instead to provide redress in the lighter form of an unapologetic settlement.²⁵ A reparation, then, is properly defined as the *revelation and realization of an apology*.²⁶ Given this definition, the authors' attempt to classify "apologies" as "a form of in-kind reparation"²⁷ simply does not work.²⁸

B. Ethical, Legal, and Prudential Considerations

After setting forth their definition of reparations, the authors discuss some of the ethical, legal, and prudential limitations as well as possibilities regarding slave redress. For example, they argue, on the one hand, that ethical individualism²⁹ (whether viewed as a compen-

cally reshaped policymakers' treatment of Native Americans). On paper, South Africa's regime of reparations is one of the most progressive forward-looking programs ever devised. It provides an extensive range of "compensatory" and "rehabilitative" reparations. See *infra* Part III.B for a discussion of these terms. There is no attempt to look back, no governmental mission to seek retribution or revenge. Everything is calculated toward the present and future—racial harmony and democratic government. For a compilation of articles discussing reparations in South Africa, see WHEN SORRY ISN'T ENOUGH, *supra* note 7, at 439–66.

25 For a discussion of the distinction between reparations and settlements, see *infra* Part III.A. Thus, while the Japanese Diet has provided money for the Comfort Women (Korean, Chinese, and other young women held in sexual slavery by the Japanese Imperial Army during World War II), it has steadfastly refused to offer a formal apology for the latter's sexual enslavement during World War II. The Comfort Women have rejected this money, demanding instead that it be accompanied by an apology from the Diet (thus creating what the Comfort Women call "atonement money"). For a collection of articles concerning the Comfort Women, see WHEN SORRY ISN'T ENOUGH, *supra* note 7, at 83–151. Similarly, many black Americans have rejected compensation for the Rosewood Riot provided under the Rosewood Compensation Act of 1994, because the state of Florida did not accompany the promise of money with an apology. See Kenneth Nunn, *Rosewood*, in WHEN SORRY ISN'T ENOUGH, *supra* note 7, at 435, 435. Like Japan and the State of Florida, the United States finds it difficult to apologize for certain atrocities. It has never apologized for its treatment of Native Americans, or for slavery or Jim Crow. For articles discussing the lack of reparations for Native Americans or slaves, see WHEN SORRY ISN'T ENOUGH, *supra* note 7, at 229–304, 399–438.

26 See *infra* text accompanying notes 118–19.

27 Posner & Vermeule, *supra* note 1, at 698.

28 Indeed, the main argument of WHEN SORRY ISN'T ENOUGH, *supra* note 7, is that simply saying "I'm sorry" in the aftermath of an atrocity is never enough. Also, I know of no redress movement in which the victims were willing to accept a simple apology as a form of "reparations."

29 Under ethical individualism, an individual is morally obligated to pay "only if he committed, or benefited from, or could have benefited from, a wrongful act." Posner & Vermeule, *supra* note 1, at 711.

satory,³⁰ or harm-based, theory of justice, in which one's intuition is to hold the wrongdoer liable to pay compensation for the harm that it causes,³¹ or as a restitutionary, or unjust-enrichment, theory of justice, in which one's instinct is to disgorge the beneficiary of an unjust gain³²) may not provide a moral basis for group-focused slave redress, because this ethical theory only recognizes individual moral rights and duties.³³ Yet the authors maintain that, on the other hand, "soft" ethical individualism and ethical collectivism³⁴ (whether viewed as a compensatory or a restitutionary theory of justice³⁵) may provide moral bases for group-focused slave redress, because both recognize moral rights and duties at the group level.³⁶ There is, in addition, a "moral taint" version of ethical collectivism that might justify slave redress. It holds that "individuals pay reparations in order to erase the moral taint that results from their (non-blameworthy) association with the wrongful acts."³⁷

Constitutionally, the fate of slave redress, though far from certain, is hopeful, according to the authors.³⁸ They correctly argue that

30 The term "compensatory" is being used in this context in its ordinary legal usage. In redress scholarship, however, the term "compensatory" has a different meaning. See *infra* Part III.B.

31 See Posner & Vermeule, *supra* note 1, at 698–700, 711.

32 See *id.* at 698, 700–03, 711.

33 See *id.* at 703.

34 Under "soft" ethical individualism and ethical collectivism, groups have moral rights and duties. "Members of the group derivatively pay or receive reparations, by virtue of their membership, even though they did not commit the wrongful act or were not the victims of the act." *Id.* at 711; see also *id.* at 703–08 (describing and critiquing the philosophical bases for "soft" ethical individualism and ethical collectivism).

35 See *id.* at 698–703, 711.

36 See *id.* at 703–07. Still, "soft" ethical individualism and ethical collectivism are not problem-free, the authors note. See *id.* at 705–06, 707–08. There is, for example, the problem of how "to calculate the harm that whites did to blacks." *Id.* at 708. But see, e.g., William Darity, Jr. & Dania Frank, *The Economics of Reparations*, 93 AM. ECON. REV. 326 (2003) (addressing distribution questions). The Atonement Trust Fund, discussed *infra* text accompanying notes 167–68, also addresses some of these concerns.

37 Posner & Vermeule, *supra* note 1, at 711; see also *id.* at 709–11 (describing the social and psychological effects of "moral taint" arising from non-culpable individual association with a wrongful act as well as association with victims by non-victims). This moves in the direction of the atonement model, except that there is no question under the atonement model that the payer and the wrongdoer are one-and-the-same. Also, the atonement model calls upon citizens to help the perpetrator-government reclaim its moral character by supporting redress programs. See *infra* text accompanying notes 153–55.

38 Unless they object based on the Establishment Clause, taxpayers lack standing to challenge the legality of federal spending. See Posner & Vermeule, *supra* note 1, at

although it is possible to craft a race-neutral government program of slave redress—such as scholarships or cash payments to “descendants of former slaves”³⁹—that may not be necessary. Equal protection does not require color-blind legislation in every instance.⁴⁰ A race-based redress program, like a race-based affirmative action program, could possibly survive strict scrutiny⁴¹ on the bases of “backward-looking or remedial grounds.”⁴² The purpose of redress would be to remedy the federal government’s past discrimination targeted toward blacks.⁴³

714 (citing *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 479 (1982); *Flast v. Cohen*, 392 U.S. 83, 102–03 (1968)). However, nonblacks may have standing to bring a lawsuit that seeks to enjoin a race-based classification on the ground that they suffer both economic and stigmatic injuries by virtue of the classification. See Posner & Vermeule, *supra* note 1, at 716 (citing *North-eastern Fla. Chapter of Assoc. Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 666 (1993)).

39 Posner & Vermeule, *supra* note 1, at 719. This formulation might not pass the rational-basis means test, however, if it is too costly to identify members of the class. See *id.* But the class could be limited to those who could, within a certain period of time, document their slave heritage. See Darity & Frank, *supra* note 36, at 327 (proposing eligibility requirements for reparations).

40 Posner & Vermeule, *supra* note 1, at 713–14 (discussing the Supreme Court’s rejection of Justices Scalia’s and Thomas’s color-blind absolutism).

41 The strict-scrutiny test asks whether a governmental racial classification serves a compelling governmental interest and is narrowly tailored to achieve that interest. See ROY L. BROOKS, *RETHINKING THE AMERICAN RACE PROBLEM* 51–54 (1990); Posner & Vermeule, *supra* note 1, at 716 (citing *Adarand Constructors v. Peña*, 515 U.S. 200, 235 (1995)).

42 Posner & Vermeule, *supra* note 1, at 712 (citing *City of Richmond v. J.D. Croson*, 488 U.S. 469, 478–80 (1989)). “If there are relevant differences between reparations statutes and affirmative action, they cut in favor of [the former’s] constitutionality.” *Id.* at 720.

43 See *Jacobs v. Barr*, 959 F.2d 313, 318 (D.C. Cir. 1992); see also Boris I. Bittker & Roy L. Brooks, *The Constitutionality of Black Reparations*, in *WHEN SORRY ISN’T ENOUGH*, *supra* note 7, at 374, 374 (discussing the constitutionality of black reparations). As the authors state:

Common sense suggests that the governmental interest in remedying massive, society-wide structural injustices such as slavery should surpass the governmental interest in remedying small-scale discrimination in particular schools, offices, or governmental programs.

Under current doctrine, however, this commonsensical distinction is turned on its head. The Court has indicated in several decisions, although never squarely held, that governmental institutions may act only to remedy “identified” discrimination within their jurisdictions.

Posner & Vermeule, *supra* note 1, at 716–17 (footnote omitted). However, the authors believe that the desire to remedy societal discrimination can satisfy the constitutional ends test with respect to slave redress.

A doctrinal reason is that the Court has never invoked the disfavored status of society-wide remediation to invalidate an affirmative action scheme en-

Similarly, the constitutionality of racial preferences can also be upheld “on forward-looking grounds such as promoting the diversity of student bodies or government workforces.”⁴⁴ If Congress’s desire to promote racial reconciliation or to reclaim its moral character is treated *pari passu* with other constitutionally acceptable forward-looking rationales, the diversity rationale in particular, then I would think that the Atonement Trust Fund would likely survive strict scrutiny.⁴⁵

One point the authors do not pay enough attention to is the fact that, under current racial preference law, affirmative action beneficiaries need not be (and usually are not) direct victims of the government’s past discrimination. Privity between the beneficiaries and perpetrator *cannot* be a requirement under the past-discrimination test because the operative discrimination typically occurs years, even decades, prior to the crafting of the race-conscious remedy.⁴⁶ To that extent, there is no need to discuss the question of whether today’s blacks, the beneficiaries of slave redress, are “victims” of slavery or Jim Crow.

The authors end with a discussion of policy-design considerations that they believe should determine the propriety of slave redress.⁴⁷

acted by Congress, as opposed to a state or local institution. In the latter setting the distinction is at least coherent, whether or not it is attractive. A local governmental institution’s jurisdiction encompasses less than all acts of discrimination committed in society. The federal government’s jurisdiction, by contrast, is itself society-wide

Id. at 717 (footnotes omitted). More importantly, the rationale for not permitting societal discrimination—namely, “to help the courts flush out race-based preference schemes that represent socially harmful interest group transfers rather than public-regarding remedial programs”—does not apply to slave redress, because “there is no targeted infliction of costs on a small group of individuals. The scheme is funded by contributions from all taxpayers,” including blacks themselves. *Id.* at 718 (footnotes omitted).

44 Posner & Vermeule, *supra* note 1, at 712; *see, e.g.*, Grutter v. Bollinger, 539 U.S. 306 (2003); Gratz v. Bollinger, 539 U.S. 244 (2003).

45 *See infra* text accompanying notes 167–68 for discussion of the Atonement Trust Fund.

46 *See, e.g.*, Fullilove v. Klutznick, 448 U.S. 448, 478 (1980) (finding that Congress had “evidence of a long history of marked disparity in the percentage of public contracts awarded to minority business enterprises”); *see also* Local No. 93, Int’l Ass’n of Firefighters v. City of Cleveland, 478 U.S. 501, 516 (1986) (“[T]he voluntary action available to employers and unions seeking to eradicate race discrimination may include reasonable race-conscious relief that benefits individuals who were not actual victims of discrimination.”); Local 28, Sheet Metal Workers’ Int’l Ass’n v. EEOC, 478 U.S. 421, 445 (1986) (holding that the Civil Rights Act of 1964, section 706(g), does not prohibit the Court from providing remedies in the form of affirmative relief that benefits individuals who were not actual victims of past discrimination).

47 Posner & Vermeule, *supra* note 1, at 725–46.

They divide the forms of redress into “cash vs. in-kind payment,”⁴⁸ and argue that the question of redress “involves considerations not only of substantive justice, according to the prevailing first-best ethical theory, but also second-best considerations of prudence, including economic cost and anticipated benefits.”⁴⁹ Missing from this discussion are historical factors that bear on the fairness of slave redress, a more informed way of understanding the forms of redress, and basic perspectives and normative positions on redress.

II. HISTORICAL CONTEXT

The Black Redress Movement is not a movement of recent vintage. It has deep historical roots in this country. Claims for redress were, in fact, made decades before the end of slavery. Since slavery, each generation of black Americans has reasserted the claim. Black leaders as diverse as Marcus Garvey (a racial separatist) and Martin Luther King (a racial integrationist) have called for slave redress. Today, proponents of redress include the National Association for the Advancement of Colored People (NAACP) (the nation’s oldest civil rights organization), Secretary of State Colin Powell, Jesse Jackson, and Louis Farrakhan.⁵⁰ Thus, not only does the claim for slave redress enjoy broad support among the black leadership, it is also timely. The redress claim is not being raised for the first time some 140 years after the fact. Thus, if there is a problem of “remoteness in time,”⁵¹ that problem must be placed squarely at the feet of the perpetrator.

A. Antebellum Period

The first recorded effort to seek redress for slavery involves a black American born free in 1759 in Massachusetts. This pioneer of slave redress, Paul Cuffe, viewed repatriation to Africa as a form of slave redress. Cuffe and other successful blacks of his day, including Gustavus Vassa, Benjamin Banneker, Phillis Wheatley, and Jupiter Hammon, were part of the larger American movement “toward intel-

48 *Id.* at 725. The authors actually use the phrase “forms of reparations,” which, of course, does not reflect a proper understanding of reparations. See *supra* text accompanying notes 14–28.

49 Posner & Vermeule, *supra* note 1, at 725.

50 For a more detailed discussion, see WHEN SORRY ISN’T ENOUGH, *supra* note 7, at 305–90. For a discussion of the civil rights theories of Marcus Garvey, Martin Luther King, Louis Farrakhan, and other civil rights leaders, see ROY L. BROOKS, INTEGRATION OR SEPARATION? A STRATEGY FOR RACIAL EQUALITY 125–88, 283–84 (1996).

51 Posner & Vermeule, *supra* note 1, at 738.

lectual and economic self-sufficiency that was so characteristic of the period.”⁵² Imbued with this post-revolutionary spirit, Cuffe financed the return of thirty-eight free blacks, including himself, to Africa in 1816. Yet, he came to believe the government should repatriate both slaves and free blacks to their homeland. As Robert Johnson states, “resettlement was seen as a means of righting a wrong that had begun two centuries earlier. . . . [T]he return to Africa was understood to be a specific, narrowly tailored form of restitution for slavery.”⁵³

The federal government did in fact finance the repatriation of a small group of free blacks in 1822, forming Liberia.⁵⁴ This was accomplished through the American Colonization Society (ACS), which was founded after Cuffe’s dramatic repatriation. Justice Bushrod Washington, George Washington’s brother, was its first president. Indeed, many politically prominent Americans were members of the ACS, including Thomas Jefferson, James Monroe, Andrew Jackson, Henry Clay, Daniel Webster, and Abraham Lincoln.⁵⁵

The ACS did not, however, equate colonization with reparations, as did Cuffe and his followers. The organization simply believed that deportation was in the best interests of both races. As Jefferson explained in *Notes of the State of Virginia*:

Deep rooted prejudices entertained by the whites; ten thousand recollections, by the blacks, of the injuries they have sustained; new provocations; the real distinctions which nature has made; and many other circumstances, will divide us into parties, and produce convulsions which will probably never end but in the extermination of the one or the other race.⁵⁶

The abolitionists, however, believed the ACS was only interested in protecting whites, that it “did not have the best interest of African Americans at heart.”⁵⁷

52 JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., *FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS* 111 (8th ed. 2000).

53 Robert Johnson, Jr., *Repatriation as Reparations for Slavery and Jim-Crowism*, in *WHEN SORRY ISN’T ENOUGH*, *supra* note 7, at 427, 427–29.

54 On the history of Liberia, including the beginning of a protracted civil war that seems to have ended with the resignation and exile of its President, Charles Taylor, in August 2003, see, for example, BROOKS, *supra* note 50, at 156–58; Edward Harris, *Marines Withdraw to Ships After 11-Day Stay in Liberia*, *SAN DIEGO UNION-TRIB.*, Aug. 25, 2003, at A3; Yaroslav Trofimov, *In Liberia’s War, Woman Commanded Fear and Followers*, *WALL ST. J.*, Aug. 22, 2003, at A1.

55 See BROOKS, *supra* note 50, at 156–57.

56 THOMAS JEFFERSON, *Notes of the State of Virginia*, in THOMAS JEFFERSON: *WRITINGS* 123, 264 (Merrill D. Peterson ed., 1984).

57 Johnson, *supra* note 53, at 429. For further discussion of the ACS and the abolitionists’ criticism, see FRANKLIN & MOSS, *supra* note 52, at 188–90.

Whatever the intentions of the ACS and in spite of Cuffe's singular effort, repatriation as a form of slave redress went nowhere fast. Repatriation was "doomed," as John Hope Franklin remarks, because "African Americans were a permanent fixture in America."⁵⁸ Even in the early nineteenth century, most blacks had come to regard America as their home. They had too much blood and labor invested in this country not to call it home. Blacks wanted to remain in the United States, but on different terms.⁵⁹

Another important antebellum expression of the redress idea came in 1842 in the form of a scathing commentary on society's treatment of blacks, slave and free black alike. It was written by an English barrister then living in the United States. James Grahame castigated the federal government and its citizens, both North and South, for not "redressing long and enormous injustice without any atoning sacrifice or reparatory expense, [for not] restoring and elevating, . . . without any surrender of interest or convenience, the rights and the dignity of a numerous race of men whom they and their fathers have ruined and degraded."⁶⁰ A precursor of the atonement model,⁶¹ this early and elegant articulation of slave redress gave way to a more earthly demand for redress in the years following the Civil War.

B. *Postbellum Period*

Penniless and defenseless, former slaves pressed for redress during the postbellum period. They did so more out of necessity and a sense of corrective justice than one of restorative justice. Ex-slave claims for redress came in two forms. The first consisted of individual claims lodged by former slaves against their former masters. Typical was a letter dated August 7, 1865, written by Jourdon Anderson to his former owner, Colonel P. H. Anderson. The letter said in part: "I served you faithfully for thirty-two years, and Mandy [his wife] twenty years. At twenty-five dollars a month for me, and two dollars a week for Mandy, our earnings would amount to eleven thousand six hundred and eighty dollars."⁶² Private redress claims continue to some

58 FRANKLIN & MOSS, *supra* note 52, at 191.

59 For a discussion of the history of the return-to-Africa movement in Liberia, see BROOKS, *supra* note 50, at 156-57.

60 James Grahame, *Why the North and South Should Have Apologized*, in WHEN SORRY ISN'T ENOUGH, *supra* note 7, at 347, 349.

61 See *infra* Part IV.A.

62 Letter from Jourdan Anderson to Col. P.H. Anderson (Aug. 7, 1865), in RANDALL ROBINSON, *THE DEBT: WHAT AMERICA OWES TO BLACKS* 240-41 (2000).

extent today in the form of lawsuits filed against families and corporations that benefited from slavery.⁶³

A second set of claims for redress was based on a federal promise of “forty acres and a mule.” Section 4 of the Freedmen’s Bureau Act of 1865 authorized the Commissioner of the Freedmen’s Bureau “to lease not more than forty acres of land within the Confederate states to each freedman or refugee for a period of three years; during or after the lease period, each occupant would be given the option to purchase the land for its value.”⁶⁴ Section 4 was designed to codify Major General William T. Sherman’s Special Field Order No. 15, issued on January 16, 1865, three months before Section 4 was enacted.⁶⁵ The promise of “forty acres and a mule” was never carried out. In a recent lawsuit, a federal district court judge, Paul L. Friedman, explained what happened:

Forty acres and a mule. As the Civil War drew to a close, the United States government created the Freedmen’s Bureau to provide assistance to former slaves. The government promised to sell or lease to farmers parcels of unoccupied land and land that had been confiscated by the Union during the war, and it promised the loan of a federal government mule to plow that land. Some African Americans took advantage of these programs and either bought or leased parcels of land. During Reconstruction, however, President Andrew Johnson vetoed a bill to enlarge the powers and activities of the Freedmen’s Bureau, and he reversed many of the policies of the Bureau. Much of the promised land that had been leased to African American farmers [approximately 400,000 acres to about 40,000 ex-slaves] was taken away and returned to Confederate loyalists. For most African Americans, the promise of forty acres and a mule was never kept.⁶⁶

Judge Friedman then discussed important evidence that links the current plight of the plaintiffs in the case, black farmers suing the Department of Agriculture for discrimination, with the government’s broken promise of “forty acres and a mule.” The significance of this discussion warrants an extended quotation:

63 See *infra* Part IV.B.

64 *Berry v. United States*, No. C-94-0796-DLJ, 1994 WL 374537, at *1 (N.D. Cal. July 1, 1994) (citing Act of Mar. 3, 1865, ch. 90, 13 Stat. 507).

65 See Headquarters, Military Div. of the Mississippi, *Special Field Order No. 15*, in *WHEN SORRY ISN’T ENOUGH*, *supra* note 7, at 365, 365.

66 *Pigford v. Glickman*, 185 F.R.D. 82, 85 (D.D.C. 1999); see Deadria C. Farmer-Paellmann, *Excerpt from Black Exodus: The Ex-Slave Pension Movement Reader*, in *SHOULD AMERICA PAY?*, *supra* note 7, at 22, 25.

Despite the government's failure to live up to its promise, African American farmers persevered. By 1910, they had acquired approximately 16 million acres of farmland. By 1920, there were 925,000 African American farms in the United States.

On May 15, 1862, as Congress was debating the issue of providing land for freed former slaves, the United States Department of Agriculture was created. The statute creating the Department charged it with acquiring and preserving "all information concerning agriculture" and collecting "new and valuable seeds and plants; to test, by cultivation, the value of such of them as may require such tests; to propagate such as may be worthy of propagation, and to distribute them among agriculturists." . . . In 1889, the Department of Agriculture achieved full cabinet department status. Today, it has an annual budget of \$67.5 billion and administers farm loans and guarantees worth \$2.8 billion.

As the Department of Agriculture has grown, the number of African American farmers has declined dramatically. Today, there are fewer than 18,000 African American farms in the United States, and African American farmers now own less than 3 million acres of land. The United States Department of Agriculture and the county commissioners to whom it has delegated so much power *bear much of the responsibility for this dramatic decline*. The Department itself has recognized that there has always been a disconnect between what President Lincoln envisioned as "the people's department," serving all of the people, and the widespread belief that the Department is "the last plantation," a department "perceived as playing a key role in what some see as a conspiracy to force minority and disadvantaged farmers off their land through discriminatory loan practices." . . . Civil Rights at the United States Department of Agriculture: A Report by the Civil Rights Action Team (Feb. 1997) ("GRAT Report") at 2.

For decades, despite its promise that "no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity of an applicant or recipient receiving Federal financial assistance from the Department of Agriculture," . . . the Department of Agriculture and the county commissioners discriminated against African American farmers when they denied, delayed or otherwise frustrated the applications of those farmers for farm loans and other credit and benefit programs. Further compounding the problem, in 1983 the Department of Agriculture disbanded its Office of Civil Rights and stopped responding to claims of discrimination. These events were the culmination of a string of broken promises that had been made to African American farmers for well over a century.

It is difficult to resist the impulse to try to undo all the broken promises and years of discrimination that have led to the precipitous decline in the number of African American farmers in the United States. The Court has before it a proposed settlement of a class action lawsuit that will not undo all that has been done. [The Settlement is] a good first step towards assuring that the kind of discrimination that has been visited on African American farmers since Reconstruction will not continue into the next century.⁶⁷

Notwithstanding the broken promise of “forty acres and a mule,” some blacks did receive land under the Southern Homestead Act of 1866. Unlike the “forty-acres-and-a-mule” promise made a year earlier, the Homestead Act was available to persons of all races. Its purpose was to encourage people to disperse from congested southern population centers. Although blacks received hundreds of thousands of acres of the eighty acres of homesteads given to the head of each family under the Act, 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. 15.⁶⁸

In 1890, an “Ex-slave Pension and Bounty Bill” was introduced in Congress by Republicans. The idea of the son of an Alabama slaveholder named Walter Vaughan, who had developed “a passion for the welfare of the former slaves,” the bill would have provided a maximum payment of fifteen dollars per month and a maximum bounty of \$500 for each ex-slave.⁶⁹ Unfortunately, the bill was never enacted into law. Supporting James Grahame’s charge that whites will not give justice to blacks if it means the “surrender of interest or convenience,”⁷⁰ Congress rejected the bill on the ground that, *inter alia*, “ex-slave pensions would be too large a burden on taxpayers.”⁷¹ Some members of Congress also believed that “only education could help the freedmen,” and the bill was not even supported by the three blacks serving in Congress at the time.⁷²

Vaughan continued his fight for ex-slave pensions. His struggle was energized by the growing number of blacks who joined his crusade. “Between 1890 and 1917, over 600,000 of the four million eman-

67 *Pigford*, 185 F.R.D. at 85–86 (emphasis added).

68 For a discussion of the Homestead Act, see FRANKLIN & MOSS, *supra* note 52, at 260.

69 David W. Blight, *If You Don’t Tell it Like it Was, It Can Never Be as it Ought to Be*, Keynote Address at the Yale, New Haven, and American Slavery Conference (Sept. 27, 2002), available at <http://www.yale.edu/glc/events/memory.htm>.

70 Grahame, *supra* note 60, at 349.

71 Blight, *supra* note 69, at 9.

72 *Id.*

ipated Africans lobbied our government for pensions because they believed their uncompensated labor subsidized the building of the nation's wealth for two and a half centuries."⁷³ Through the establishment of "Ex-Slave Pension Clubs," including the National Ex-Slave Mutual Relief Bounty and Pension Association, blacks took the forefront in the unsuccessful campaign for a federal ex-slave pension bill.⁷⁴

This round of the legislative effort ended unsuccessfully in 1916. The idea of an ex-slave pension bill never received the support of mainstream black civil rights organizations like the National Negro Business League or the NAACP. The cruelest fate of all befell some of the leaders of the pension movement. The federal government "pursued, prosecuted, and convicted" many of these leaders on questionable charges, such as "acting fraudulently by collecting money to fund a lobbying effort that instilled the false hope in the hearts of the ex-slaves that the government would give them a pension."⁷⁵

C. *Early Twentieth Century*

In 1916, four blacks reported to have had some affiliation with the ex-slave pension cause initiated what may be the first reparations lawsuit ever filed. Filed in the Federal District Court of the District of Columbia, the lawsuit alleged that the Treasury Department owed blacks "\$68,073,388.99, which was the amount of taxes collected on cotton between 1862 and 1868."⁷⁶ According to David Blight, "[s]ince the records for that period could apparently be recovered and traced, such a figure was arrived at as the compensation owed blacks for their labor in production."⁷⁷ Like so many redress lawsuits filed today, this lawsuit was dismissed without a decision on the merits.⁷⁸

The final attempt to secure pensions for the ex-slaves came in 1934. It was a last-ditch effort engineered by some of the former slaves themselves. A group wrote to President Franklin Roosevelt asking: "Is there any way to consider the old slaves?" They wanted to know, in particular, if anything was being done about the idea of "giving us pensions in payment for our long days of servitude."⁷⁹ Of course, nothing was done. The idea of constructing a memorial in

73 Farmer-Paellmann, *supra* note 66, at 27.

74 *See id.*

75 *Id.* at 27; *see* Blight, *supra* note 69, at 9–10.

76 Johnson v. McAdoo, 45 App. D.C. 440, 440–41 (1916).

77 Blight, *supra* note 69, at 10.

78 *See* Roy L. Brooks, The Slave Redress Cases 43 (Feb. 10, 2004) (unpublished manuscript, on file with author).

79 Blight, *supra* note 69, at 10.

Washington, D.C. to commemorate the slaves was, however, mentioned as an alternative. But this idea, which had been kicked around Washington for a number of years, went the way of the ex-slave pension bill.

D. Post-Holocaust

The Holocaust changed the way many proponents of slave redress conceptualize the movement. More than any other historical event, the Holocaust shamed the community of civilized nations into taking human rights seriously. It awakened a rare spirit of human understanding among the community of nations. What the Holocaust taught, perhaps more than any other lesson, is that atrocities can only occur when the perpetrator fails to *identify* with its victims and fails to recognize a common humanity between itself and the victims. When German political leaders did not identify with Jewish citizens, we had the makings of the Holocaust. Conversely, when identity exists—when the government understands that people of different religious and racial backgrounds have equal moral and legal standing—it is not likely to treat a segment of its population in barbaric ways.⁸⁰

Although this post-Holocaust vision of heightened morality, identity, egalitarianism, and restorative justice was little reflected in the Black Redress Movement during the turbulent 1960s—a time in which the Movement was mostly associated with James Forman’s “Black Manifesto”⁸¹—it has shaped the slave-redress claim in recent years. Beginning with Congressman John Conyers’s (Democrat from Michigan) slave redress bill, HR 40,⁸² first introduced in Congress in 1989,⁸³ the

80 See generally Brooks, *supra* note 19, at 3–11 (discussing “human injustice,” its history and examples, along with acts of atonement and their impact on society’s moral threshold).

81 The “Black Manifesto,” presented in 1969, outlined in detail many ambitious economic demands, including “the creation of banks, presses, universities, and training centers for African Americans, all to be established as repayment for centuries of racist degradation and exploitation.” Joe R. Feagin & Eileen O’Brien, *The Growing Movement for Reparations*, in WHEN SORRY ISN’T ENOUGH, *supra* note 7, at 341, 341–42. These demands were, of course, largely ignored. The “Black Manifesto,” officially titled, “Manifesto,” was adopted by the National Black Economic Development Conference in Detroit, Michigan, on April 26, 1969. The “Manifesto” is reproduced in its entirety as Appendix A in Boris I. Bittker’s seminal work on slave redress, *THE CASE FOR BLACK REPARATIONS* 159–75 (1973).

82 H.R. 40, 105th Cong. § 2(b)(3) (1997).

83 Given the name H.R. 40 in recognition of the government’s broken promise of “forty acres and a mule,” this bill calls for the creation of a commission to study the question of slave redress. See *supra* text accompanying notes 63–65. It does not request any particular form of redress, but merely asks that the commission study the

Black Redress Movement has aligned itself with the forward-looking international redress movement. But because some proponents of slave redress continue to see the matter from a backward-looking posture—filing numerous lawsuits, for example⁸⁴—a fundamental tension has developed within the Black Redress Movement. As I shall discuss in Part IV, the authors completely miss this critical dichotomy.

Whether justified on backward-looking notions of corrective justice or on forward-looking precepts of restorative justice, the historical record on slave redress must count for something in the debate. It gives the slave-redress claim additional moral weight. Black Americans are not asserting a new or delayed claim. There is no unconscionable or prejudicial procrastination, as the slave-redress claim was first brought even *before* the institution of slavery was abolished.⁸⁵ Thus, if the slave-redress claim is “remote,” it is not the fault of those bringing the claim. The claim being advanced today is the same claim asserted repeatedly since the eighteenth century and each time denied under a corrupt socio-legal order. Slave descendants are standing in the shoes of their forefathers, making the same claim their family members would be making were they alive today. Only the remedies—the forms of redress—have changed with the passage of time.

III. FORMS OF REDRESS

A. *Reparations Versus Settlements*

The authors fail to recognize that not all responses to an atrocity are reparations. Some are intended to be remorseful; others are intended to simply make the matter go away, to get over the hump, as it were.⁸⁶ Thus, a clear distinction is made between “reparations” and “settlements.” The latter, unlike the former, refers to an unremorseful, unapologetic perpetrator response to an atrocity. As I wrote on an earlier occasion, “[settlements] can be analogized to their use in American law. Often a defendant corporation will settle a dispute by

redress issue. This commission would operate in a manner similar to the commissions established for Japanese and Italian Americans. It would not, however, be as powerful as the Indian Claims Commission, which had authority to decide Native Americans' redress claims. See John Conyers, *The Commission to Study Reparations Proposals, in WHEN SORRY ISN'T ENOUGH*, *supra* note 7, at 367, 367. Despite these reasonable requests, the bill has never even been voted out of its congressional subcommittee. Consequently, Congress, never having had the redress bill brought before it for formal action, has never voted on it.

84 See *infra* Part IV.B.

85 See *supra* Part II.A.

86 See *supra* note 24.

signing a consent decree in which it agrees to pay the plaintiff(s) a certain sum of money, but does not concede any wrongdoing.”⁸⁷ Thus, some of the “reparations” listed by the authors are, in fact, settlements rather than reparations.⁸⁸

Reparations and settlements do, however, share a few common features. Both, for example, are typically civil measures. While it is possible to view a criminal prosecution of government officials as a form of redress brought on behalf of the victims in a judicial forum,⁸⁹ criminal redress is a poor proxy for civil redress in the case of an atrocity. From the victim’s perspective, fining, imprisoning, or even executing convicted government officials is a most unsatisfactory response to an atrocity. Criminal redress fails to respond to the victim’s physical or psychic injuries, or to the loss or destruction of property. Consequently, civil redress—private recourse—is the only practical and humane way to remedy the victim’s private pain.

B. *Compensatory Versus Rehabilitative Redress*

Reparations and settlements come in many forms. The authors discuss two of these forms: “cash vs. in-kind payments,”⁹⁰ a distinction I previously offered in *When Sorry Isn’t Enough*.⁹¹ But besides the fact

87 Brooks, *supra* note 19, at 8.

88 See Posner & Vermeule, *supra* note 1, at 696–97. The Rosewood Compensation Act of 1994, for example, was a settlement rather than a reparation, which caused many black Floridians to strongly object to the payments. See, e.g., Nunn, *supra* note 25, at 435.

89 Indeed, criminal redress is sometimes available in lieu of or in addition to civil redress. See, e.g., TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 (1949–1953) (chronicling the trials of Nazi leaders convicted of various war crimes). In an effort to “redress the historic tendency to trivialize, excuse, marginalize and obfuscate crimes against women, particularly sexual crimes, and even more so when they are committed against non-white women,” several Asian non-governmental organizations (NGOs) helped to create the Women’s International War Crimes Tribunal. See Women’s Int’l War Crimes Tribunal 2000, *Prosecutors and Peoples of Asia Pacific Region v. Hirohito; Prosecutors and Peoples of Asia Pacific Region v. Japan, Summary of Findings and Preliminary Judgment* ¶ 5, at <http://www1.jca.apc.org/vaww-net-japan/english/womenstribunal2000/judgement.html> (Dec. 12, 2000). After conducting hearings from December 8–12, 2000, on the reparation claims of Comfort Women, the tribunal found that Japan violated international law when it engaged in the practice of sexual slavery during World War II. The tribunal has no authority to enforce its judgment, however. For a discussion of Japan’s failure to provide adequate redress for Koreans and other Comfort Women forced to provide sexual services to the Japanese Imperial Army during World War II, see *WHEN SORRY ISN’T ENOUGH*, *supra* note 7, at 83–151.

90 Posner & Vermeule, *supra* note 1, at 725–36.

91 See Brooks, *supra* note 19, at 9.

that the authors classify all forms of redress as reparations,⁹² failing to discriminate between reparations and settlements,⁹³ they give insufficient attention to the most important distinction among the forms of redress—*compensatory* reparations or settlements versus *rehabilitative* reparations or settlements.⁹⁴

Compensatory measures are directed toward the individual victim or his or her immediate family. Such redress is intended to be compensatory only in a symbolic sense, because nothing can undo the past or truly return the victim to the status quo ante.⁹⁵ In contrast, rehabilitative redress is directed toward the victim's group or community. It is designed to benefit the victim's group, to nurture the group's self-empowerment and, thus, aid in the nation's social and cultural transformation.⁹⁶ Hence, compensatory and rehabilitative redress are not only structurally different, but they suggest different ways of justifying redress.

Whether compensatory or rehabilitative, redress can come in monetary or non-monetary (what the authors call "in-kind") forms. Unrestricted cash payments or restricted cash payments (such as scholarship funds) given directly to the victims or their immediate families are monetary compensatory settlements or reparations.⁹⁷ In contrast, unrestricted cash payments or restricted cash payments to the victim's community are monetary rehabilitative settlements or reparations. Although non-monetary reparations can be compensatory, such as a statue commemorating a family member, they are more

92 See *supra* text accompanying notes 18–28.

93 See *supra* Part I.A.

94 Like the authors, I once saw monetary versus nonmonetary as the basic distinction. See Brooks, *supra* note 19, at 9. Having listened to critiques of my conceptual scheme at several conferences since the publication of my book, I am now convinced that the basic distinction is compensatory versus rehabilitative, for the central question here is whether it is "better" to honor the victim's request for compensation, whether monetary or nonmonetary, or ignore that request and, instead, provide redress to the victim's community. This issue is brought to life most dramatically in the case of the Comfort Women. See Roy L. Brooks, *What Form Redress?*, in *WHEN SORRY ISN'T ENOUGH*, *supra* note 7, at 87–91. But even my prior emphasis incorporated a second-level distinction between compensatory and rehabilitative redress. See Brooks, *supra* note 19, at 9.

95 See Brooks, *supra* note 19, at 9.

96 See *id.*

97 In January 2002, for example, West Georgia College, which is a small college located in Georgia, apologized for rejecting every black applicant from the town's all-black high school in 1955 and 1956. To solidify that apology, the college established through an anonymous donor a scholarship fund for the descendants of the sixty or seventy students who were denied admission some fifty years ago. See *Scholarship Is Apology for Bias*, *SAN DIEGO UNION-TRIB.*, Jan. 18, 2002, at A20.

often rehabilitative. Affirmative action for the victim's group or a "Museum of Slavery" memorializing the slaves and educating the public about slavery's contribution to our nation are examples of non-monetary rehabilitative settlements or reparations.⁹⁸

It may be useful to quickly review the forms of redress provided in some of the high-profile redress movements around the world and in the United States. Germany has provided redress in the forms of monetary compensatory and monetary rehabilitative reparations to Holocaust victims and to Israel.⁹⁹ Japan, which refuses to apologize for sexually enslaving thousands of young women during World War II (the Comfort Women), has provided redress in the forms of monetary compensatory and monetary rehabilitative settlements. The Comfort Women have rejected these forms of redress. Instead, they demand reparations.¹⁰⁰ To its credit, South Africa has opted for reparations rather than settlement. A great deal of remorse exists in South Africa (perhaps more so among its political and intellectual leaders than the average citizen, however)¹⁰¹ over the injustices of Apartheid. The government's Truth and Reconciliation Commission (TRC), which on July 31, 1998, ended two-and-a-half years of investigations into Apartheid-related injustices, has provided reparations in the forms of individual compensation and community rehabilitation.¹⁰²

Moving to the United States, Japanese Americans and Aleuts have received a variety of reparations from an apologetic United States for forcible relocation and internment during World War II. Reparations were made monetarily and non-monetarily to both the victims themselves (compensatory) and to their groups (rehabilitative) pursuant to the Civil Liberties Act of 1988.¹⁰³ For example, \$20,000 in compensation was allocated to each Japanese American victim. Non-monetary individual compensation was provided in the forms of a presidential

98 See Brooks, *supra* note 19, at 10 (discussing Rosewood Compensation Act of 1994).

99 See WHEN SORRY ISN'T ENOUGH, *supra* note 7, at 12–81; Brooks, *supra* note 19, at 9.

100 See WHEN SORRY ISN'T ENOUGH, *supra* note 7, at 83–151; Brooks, *supra* note 19, at 9.

101 Compare Wilhelm Verwoerd, *Justice After Apartheid? Reflections on the South African TRC*, in WHEN SORRY ISN'T ENOUGH, *supra* note 7, at 479, 479 (defending the role of the TRC in post-apartheid South Africa), with Emily H. McCarthy, *Will the Amnesty Process Foster Reconciliation among South Africans?*, in WHEN SORRY ISN'T ENOUGH, *supra* note 7, at 487, 487 (discussing the reaction of various South African groups to the TRC).

102 See WHEN SORRY ISN'T ENOUGH, *supra* note 7, at 439–510; Brooks, *supra* note 19, at 10.

103 Civil Liberties Act of 1988, 50 U.S.C. § 1989b (2000).

pardon and restitution of status and entitlements lost due to relocation and internment. Non-monetary rehabilitation was offered in the form of certain educational programs and a monument commemorating the victims.¹⁰⁴ Native Americans have received no dearth of unapologetic redress, including the return of land in a very few incidents. Most of this has been rehabilitative rather than compensatory.¹⁰⁵ It is only the slave-redress claim that has gone unanswered in the United States.¹⁰⁶

However, black Americans, not unlike other victim groups, are divided over the best strategy for pursuing redress for slavery and Jim Crow. While a growing number of blacks take a forward-looking, restorative justice approach, thereby bringing the Black Redress Movement in line with the international redress movement, other blacks are willing to settle for a backward-looking, corrective justice approach. This difference of perspective has given rise to competing approaches to slave redress—a fundamental dichotomy in redress movements, which the authors simply missed.

IV. MODELS OF REDRESS

Two approaches to redress have emerged in recent years loosely tied to the basic division in the forms of redress—reparations and settlement. One approach, called the “atonement model,” is centered primarily on rehabilitative reparations, while the other, called the “tort model,” is mainly calculated toward compensatory settlements. The atonement model, more than the tort model, is aligned with the international redress movement developed in the years following World War II. It articulates the movement’s post-Holocaust vision of heightened morality, identity, egalitarianism, and restorative justice.¹⁰⁷ Thus, proponents of the atonement model, such as myself, would vehemently disagree with the authors’ contention that claims seeking redress for historical injustice, including slave-redress claims, are morally justified “on backward-looking grounds of corrective justice, rather than forward-looking grounds.”¹⁰⁸

104 See *WHEN SORRY ISN'T ENOUGH*, *supra* note 7, at 153–228; Brooks, *supra* note 19, at 10.

105 See *WHEN SORRY ISN'T ENOUGH*, *supra* note 7, at 229–304; Brooks, *supra* note 19, at 10.

106 See *WHEN SORRY ISN'T ENOUGH*, *supra* note 7, at 305–438; Brooks, *supra* note 19, at 10.

107 See *supra* Part II.D.

108 Posner & Vermeule, *supra* note 1, at 691–92.

A. *The Atonement Model*

In understanding the atonement model, it is useful to begin at the beginning, asking: “Why do we look to the past?” “Why do we dig up past injustices?” “Why should a government provide redress for its past injustices?” It cannot be simply to compensate living victims. Social structures are in place that can tend to the victims’ needs. For example, civil rights laws can redress current discrimination or the lingering effects of past discrimination, whether or not a byproduct of slavery or Jim Crow.¹⁰⁹ Welfare and disability benefits are available to provide sustenance for economic privation.¹¹⁰ Even if these resources were not available, redress cannot primarily be about victim compensation. No amount of money can return the victim to the status quo ante. Focusing on compensation, as Anthony Sebok has suggested, also carries the danger of commodifying the horrors of slavery and Jim Crow, turning these human rights violations, these atrocities, into market transactions.¹¹¹ It is no wonder, then, that some victims have rejected compensatory settlements as little more than “blood money.”¹¹²

Given these considerations, I wish to argue that we look to the past not only with respect to slavery and Jim Crow but for any atrocity essentially for two reasons, both of which are forward-looking. The first is to effectuate reconciliation—identity—between the victim and the perpetrator. The second reason is to give the perpetrator an op-

109 See generally ROY L. BROOKS ET AL., *CIVIL RIGHTS LITIGATION: CASES AND PERSPECTIVES* (2d ed. 2000) (exploring the history of civil rights law).

110 See generally CHARLES W. MEYER, *SOCIAL SECURITY DISABILITY INSURANCE: THE PROBLEMS OF UNEXPECTED GROWTH* (1979) (providing a history of disability insurance development as well as statistics concerning the recipients of benefits); Joannie Fischer, *Helping Hand: Casting a Wide Net*, U.S. NEWS & WORLD REP., Sept. 23, 2003, at 68 (offering a brief history of social insurance in the United States).

111 See Sebok, *Prosaic Justice*, *supra* note 7, at 53. For a response, see Dagan, *supra* note 7, at 41–43.

112 The blood-money question was raised by some Japanese Americans in connection with the Civil Liberties Act of 1988, which provided several forms of redress, including compensatory reparations, for Japanese American internees. Responding to this issue during congressional hearings on the legislation, Rep. Norman Y. Mineta (Democrat from California), who was himself interned during World War II, conceded that liberty is priceless, but argued that this does not make compensatory reparations inappropriate. Japanese Americans who support the legislation, he maintained, did not sell their civil and constitutional rights. These rights were “ripped away,” and that fact alone entitles survivors to compensation, atonement money. See *Testimony in support of H.R. 442 Before the Subcomm. on Admin. Law of the House Comm. on the Judiciary*, 100th Cong. 103 (1987) (statement of Rep. Norman Y. Mineta, Member, House Comm. on the Judiciary), *reprinted in* WHEN SORRY ISN’T ENOUGH, *supra* note 7, at 205, 205.

portunity to reclaim its moral character.¹¹³ With respect to the first reason, reconciliation is an attempt to repair the foundation upon which present and future relations are based. The intent is to make the present and future better, more livable, more wholesome for the members of the social order by repairing a broken relationship between victims and perpetrators occasioned by a gross violation of human rights. Without reconciliation, there can be no healthy relationship, or relationship at all, between the victims and their perpetrator now or in the future—not if the victims have any pride.¹¹⁴

Revisiting the past also allows the perpetrator to come clean. The perpetrator has the opportunity to reclaim its moral character in the aftermath of an atrocity, an unspeakable act against humanity. Since the Holocaust, some perpetrator-governments have recognized that redress is in this sense as much for them as it is for the victim. Speaking for the German government and its people, Konrad Adenauer, the first Chancellor of the Federal Republic of Germany, uttered these immortal words in the years following the destruction of the Third Reich: “*In our name, unspeakable crimes have been committed and demand [redress] . . . , both moral and material.*”¹¹⁵

The twin goals of redress—reconciliation and reclaiming moral character—converge in the atonement model. The atonement model takes as its normative stance the assertion that redress should be about apology first and foremost, and that apology is a necessary precondition for reconciliation and character rebuilding. Apology in the context of a past atrocity “is more complex than ‘contrition chic,’ or the canonization of sentimentality.”¹¹⁶ It is a matrix of intensity and statesmanship that “improves the national spirit and health.”¹¹⁷ When the perpetrator of an atrocity apologizes, it must confess the deed, admit that the deed constitutes an atrocity, repent, and ask for forgiveness. All four conditions of remorse are essential to taking personal responsibility.¹¹⁸

113 See, e.g., Brooks, *supra* note 19, at 3–11; Newton, *supra* note 23, at 261–69; Ulrich, *supra* note 23, at 369–84.

114 See, e.g., HENDERSON, *supra* note 7, at 1; TUTU, *supra* note 7, at 91.

115 Foreign Claims Settlement Comm’n, U.S. Dep’t of Justice, *German Compensation for National Socialist Crimes*, reprinted in WHEN SORRY ISN’T ENOUGH, *supra* note 7, at 61, 61.

116 Brooks, *supra* note 19, at 3.

117 *Id.*

118 See Roy L. Brooks, The African American Redress Movement Post-Sept. 11, 2001, Address Delivered at Clairmont Graduate University 9 (Feb. 9, 2002) (on file with author) (mentioning three of the four conditions).

In furtherance of the apology, the atonement model requires the perpetrator to do something tangible. Just saying “I’m sorry” is not enough. The perpetrator must solidify its apology with a redemptive act so as to make the apology believable—more than just words. That redemptive act is, properly speaking, a “reparation.” A reparation is the tangible act that transforms the rhetoric of apology into a meaningful, material reality. Accordingly, a reparation can be defined as “the revelation and realization of an apology.”¹¹⁹

Atonement (apology plus reparation) is not a punishment for guilt, but, rather, an *acknowledgment* of guilt. When the perpetrator of an atrocity apologizes and solidifies that apology with meaningful reparations, it demonstrates a commitment to the victims. It signifies publicly that it understands the moral enormity of its actions and the pain it has caused and continues to cause the victims. By atoning, the government, in short, not only clarifies the historical record, but also communicates to the world that it “gets it.”¹²⁰

The significance of “getting it” cannot be overstated. Atonement engenders reconciliation by formally recognizing the existence of a broken relationship between perpetrator and victim. When the perpetrator satisfies the four elements of apology—confesses the deed, admits that the deed constituted an atrocity, repents, and asks for forgiveness¹²¹—it publicly acknowledges the atrocity has damaged existing relations. Apologizing recognizes, as Terrence Paupp puts it, that “[t]o maintain the current order of social relations, which is damaged because it results from . . . [a] historical injustice, is to maintain a system of unjust relations.”¹²²

When the perpetrator tenders an apology and commensurate reparations, it places the matter of forgiveness on the table. Forgiveness arrives on the victim’s desk as a kind of civic subpoena. An affirmative response is required, provided, of course, the preconditions of apology and reparations have been duly met. As a citizen, the victim has a duty to support its government’s atonement and the prospect of reconciliation that flows therefrom.¹²³ In short, the perpetrator’s atonement and the victim’s corresponding forgiveness

119 *Id.* at 10; see *supra* text accompanying note 22.

120 Punishment would, indeed, undercut the reconciliation goal of the atonement model.

121 See *supra* text accompanying notes 117–18.

122 Terrence Edward Paupp, *The Continuing Effects of Slavery: Reparations and the Moral Mandate of Apology*, 60 GUILD PRAC. 13, 19 (2003).

123 As I argue below, citizens have a civic responsibility to help repair the lingering effects of the atrocity—broken relationships and damaged moral character. See *infra* text accompanying notes 153–54.

set the stage for repairing a broken, unhealthy relationship caused by the atrocity.

The authors simply ignore these forwarding-looking, restorative features of redress—*restoring a broken relationship and restoring moral character*. In so doing, they miss the most powerful argument in favor of slave-redress and, hence, the most compelling feature of the Black Redress Movement. Far from justifying its claim for redress “on backward-looking grounds of corrective justice,” as the authors would have us believe is or should be the case,¹²⁴ the new scholarship and thinking about slave redress is self-consciously forward-looking.¹²⁵ And it is this promise of racial reconciliation and moral character that connects the Black Redress Movement to the larger international redress movement.¹²⁶

Because the authors do not consider the atonement model, much of their discussion regarding the ethical dimensions of redress, particularly slave redress, misfires. While the authors recognize that governments or nations can have ethical duties,¹²⁷ they mainly assume that white Americans are being asked to shoulder the *moral* obligation for slavery,¹²⁸ that the moral obligation is largely punitive,¹²⁹ that there needs to be living victims for the moral obligation to accrue,¹³⁰ and that the preferred form of redress for slavery is monetary compensation.¹³¹ Thus, the authors assert, “[a] theory of reparations asserts that one group of individuals bears an obligation to remedy a historical injustice that it, or some prior group, inflicted on another group of individuals.”¹³²

Under the atonement model, living individuals are not deemed to be guilty of an atrocity that took place before they were born. Thus, white Americans today are not viewed as perpetrators of slavery. They simply had nothing to do with that particular atrocity, although it is possible that some whites did play a role in Jim Crow, which ended only thirty years ago. On the other hand, the government, particularly the federal government, can and should be blamed for both atrocities. Slavery and Jim Crow could not have existed but for the imprimatur of the federal government and its predecessor regimes.

124 Posner & Vermeule, *supra* note 1, at 691–92.

125 See, e.g., sources cited *supra* note 7; *supra* Part II.D.

126 See *supra* Part II.D.

127 See Posner & Vermeule, *supra* note 1, at 698–99, 703–08.

128 See *id.* at 699–703, 709–11.

129 See *id.* at 698–711.

130 See *id.* at 699–703.

131 See *id.* at 698–711.

132 *Id.* at 711.

Let us take slavery as an example. Chattel slavery became institutionalized in the colonies in the years after the first blacks were put ashore at Jamestown, Virginia, in 1619 by the captain of a Dutch frigate. This ominous transformation in the socio-legal status of blacks took place first by custom in the New England colonies (1638) and then by law in Massachusetts (1641).¹³³ Despite changes in the structure and personnel of the government, colonial policies protecting slavery were subsequently incorporated into the founding document of the new republic in 1787. Some have argued that the Constitution as written in 1787 is neutral as to the issue of slavery simply because the word “slave” or “slavery” is nowhere to be found in the text of the document.¹³⁴ This argument, at best, is based on a superficial reading of the Constitution. Even the delegates to the Constitutional Convention in Philadelphia recognized slavery’s footprints all over the document. They read the Constitution in juxtaposition with its predecessor text, the Articles of Confederation, understanding that the latter laid the foundation for the former. William Paterson of New Jersey, for example, noted that “under the Articles of Confederation, Congress ‘had been ashamed to use the term ‘Slaves’ & had substituted description.’”¹³⁵ Another delegate, James Iredell of North Carolina, agreed, stating that “[t]he word *slave* is not mentioned [because] the northern delegates, owing to their particular scruples on the subject of slavery, did not choose the word *slave* to be mentioned.”¹³⁶ Paul Finkelman suggests that this omission was acceptable to the southern delegates “[a]s long as they were assured of protection for their institution.”¹³⁷

The Constitution of 1787 did, indeed, provide ample protection for the evil institution without directly using the word “slave” or “slavery.” One could quite easily come to the conclusion that the Constitution, in fact, went beyond the Articles of Confederation in its treatment of slavery. Although the latter neither endorsed nor condemned slavery—it simply permitted slavery to exist as it always had,

133 See Brooks, *supra* note 19, at 7.

134 See, e.g., Earl Maltz, *Slavery, Federalism, and the Structure of the Constitution*, 36 AM. J. LEGAL HIST. 466, 468 (1992) (arguing that the Constitution did nothing to slavery, that slavery was left to exist as it had prior to 1787, and that federal respect for comity dictated this result).

135 PAUL FINKELMAN, *SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON* 6 (2d ed. 2001) (quoting William Paterson).

136 *Id.* (quoting James Iredell).

137 *Id.*

which, of course, is a kind of tacit endorsement¹³⁸—the former affirmatively embraced the peculiar institution. No less than five provisions of the Constitution directly accept and protect slavery. The “Three-Fifths Clause” counted only three-fifths of a slave in determining a state’s population for purposes of congressional representation and any “direct taxes.”¹³⁹ The “Slave Trade Clause” prevented Congress from ending the slave trade before the year 1808, but did not require Congress to ban it after that date.¹⁴⁰ Somewhat redundantly, the “Three-Fifths Clause” ensured that a slave would be counted as three-fifths of a white person if a head tax were ever levied.¹⁴¹ The “Fugitive Slave Clause” required the return of fugitive slaves to their owners “on demand.”¹⁴² Finally, Article V prohibited Congress from amending the Slave Trade Clause before 1808.¹⁴³

These constitutional directives, plus about a dozen others that indirectly support slavery,¹⁴⁴ made the Constitution of 1787 a *slaveholder’s Constitution*. William Lloyd Garrison, the nineteenth-century abolitionist, was not exaggerating when he referred to the Constitution as “a covenant with death,” “an agreement with Hell,” “a proslavery” Constitution.¹⁴⁵ Modern historians are in agreement with this view. The late Don Fehrenbacher, for example, referred to the United States as “the slaveholding republic” in the title of his book.¹⁴⁶ Similarly, the ever-cautious David Davis argues that “[t]he U.S. Constitution was designed to protect the rights and security of slaveholders, and between 1792 and 1845 the American political system encouraged and rewarded the expansion of slavery into nine new states.”¹⁴⁷

This foreboding sense that the Founding Fathers were riding with a few corpses in their cargo was a common feeling at the time. Reading Madison’s papers, Wendell Phillips, a nineteenth-century Garrisonian, came to the conclusion that “the Nation at large were fully aware of this bargain at the time, and entered into it willingly and with

138 For a general discussion of the Articles of Confederation, see MERRILL JENSEN, *THE NEW NATION: A HISTORY OF THE UNITED STATES DURING THE CONFEDERATION, 1781–1789* (Northeastern Classics ed. 1981).

139 U.S. CONST. art. I, § 2, cl. 3.

140 *Id.* § 9, cl. 1.

141 *Id.* § 2, cl. 3.

142 *Id.* § 9, cl. 4.

143 *Id.* art. V, § 2, cl. 3.

144 See FINKELMAN, *supra* note 135, at 7–9.

145 *Id.* at 3.

146 DON E. FEHRENBACHER, *THE SLAVEHOLDING REPUBLIC: AN ACCOUNT OF THE UNITED STATES GOVERNMENT’S RELATIONS TO SLAVERY* (Ward M. McAfee ed., 2001).

147 DAVID BRION DAVIS, *IN THE IMAGE OF GOD: RELIGION, MORAL VALUES, AND OUR HERITAGE OF SLAVERY* 134 (2001).

open eyes.”¹⁴⁸ Under the slogan “No Union with Slaveholders,” Garrison and his followers “refused to participate in American electoral politics, because to do so they would have had to support ‘the pro-slavery, war sanctioning Constitution of the United States.’”¹⁴⁹ The Garrisonians, in fact, “repeatedly argued for a dissolution of the Union.”¹⁵⁰

Thus, there is ample historical evidence to hold our federal government, which came into existence under our Constitution in 1787, morally responsible for slavery. Accordingly, the following syllogism—the atonement syllogism—should replace the authors’ moral arguments in favor of redress for slavery:¹⁵¹ (1) When a government commits an atrocity against an innocent people, it has, at the very least, a moral obligation to atone (apologize and provide reparations); (2) The government of the United States committed atrocities against black Americans for two-and-a-quarter centuries in the form of chattel slavery and for an additional hundred years in the form of Jim Crow—what Justices Ginsburg and Breyer refer to as “a law-enforced racial caste system”¹⁵²—and it has not even tendered an apology for either; (3) The United States government should, therefore, atone for racial slavery and apartheid.¹⁵³

1. Why Innocent Citizens Should Support Atonement

Although only the guilty party is required to atone, the atonement model does place a civic duty on *all* members of a society to help make the atonement process successful. Citizens are deemed to have a civic responsibility to assist in repairing the lingering effects of the atrocity—the broken relationship between victim and perpetrator and the latter’s damaged moral character. Thus, a distinction is made here between guilt (corrective justice) and responsibility (restorative justice). Legally, “the guilty party is responsible for making reparations, precisely because of his or her personal complicity in perpetrating a crime.”¹⁵⁴ However, in moral matters:

148 FINKELMAN, *supra* note 135, at 5 (quoting WENDELL PHILLIPS, *THE CONSTITUTION: A PRO-SLAVERY COMPACT; OR, SELECTIONS FROM THE MADISON PAPERS*, at v–vi (2d ed. New York, American Anti-Slavery Society 1845)).

149 *Id.* at 3.

150 *Id.*

151 For a discussion of the authors’ moral arguments for and against redress, see *supra* Part I.B.

152 *Grutter v. Bollinger*, 539 U.S. 306, 345 (2003) (Ginsburg, J., concurring).

153 See Brooks, *supra* note 19, at 3–11; Brooks, *supra* note 94, at 87–91.

154 Ulrich, *supra* note 23, at 377.

[I]t is sometimes necessary to operate with a notion of *responsibility without guilt*. When reparation claims are shifted from the legal realm to a predominantly moral context, and in particular when they concern past wrongs, one finds a pronounced tendency for this premise to take on increased significance. Because the parties involved in the reparations process are not the same as were involved in the original wrongdoing, guilt can only be of a derivative nature, and in most cases it makes no sense to speak of guilt at all. One can state categorically that post-war generations of Germans are *not* guilty of the wrongs committed during the 1930s and 1940s. Nor are present-day Europeans and Americans (or Africans and Arabs, for that matter) in any way personally guilty of the trans-Atlantic slave trade. Nevertheless, we may be prepared to attribute some form of responsibility to the descendants of war criminals or slave-traders for the crimes of an earlier generation.¹⁵⁵

In the United States, there are additional reasons white ethnic groups and nonblack persons of color should support slave redress. White ethnic groups benefit more than other American groups from the lingering effects of slavery. They are favored in the color hierarchy created by slavery and preserved by Jim Crow. Whiteness in the main is an asset in this country, not a liability. Those who have it benefit from it, both in terms of the psychology of slavery and the socioeconomics of slavery. Racial fault lines laid down during slavery continue to give whites racial advantages. Richard Delgado elaborates on the “drawing power of whiteness”:

Not only are whites in this country the most numerous and powerful group—something that could easily change over time—they are also normative, their ideas, hopes, values, holidays, heroes, traditions, language and narratives enshrined deeply in American culture. American children’s heroes, like Snow White, are Euro-American. Language imagery associates whiteness with purity, innocence, and virtue. Think of our most sacred ceremonies: white is for weddings, black for funerals. Even many minorities carry these associations and attitudes in their heads. Phrases like “sisterhood is powerful,” “brown and black power,” “power to the people,” and others invoking outgroup solidarity possess an undeniable appeal. But whiteness’s rewards, which include acceptance, validation, power, and influence, can plant a seed of doubt in the mind of any but the most dedicated insurgent of color.¹⁵⁶

155 *Id.* at 378. This is different from the authors’ notion of moral taint. See *supra* text accompanying notes 35–36.

156 Richard Delgado, *Linking Arms: Recent Books on Interracial Coalition as an Avenue of Social Reform*, 88 CORNELL L. REV. 855, 870 (2003) (footnotes omitted); see Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709 (1993).

Newcomers to our shores have a special reason to show appreciation for what the slaves have done for them. Even the most recent arrivals enjoy the lingering beneficial effects of slavery. As a friend of Vivian Martin stated when explaining the benefits of slavery to her conservative history students, “[t]here would have been no [country] here to make immigration seem attractive to your ancestors if there hadn’t been slaves here first who built it.”¹⁵⁷ White immigrants have another reason to support slave redress. Immigrants necessarily assume the liabilities as well as the assets—the negative legacies as well as the positive ones, slavery as well as the Declaration of Independence—of our country or any other country to which they emigrate. A Russian immigrant in the United States will enjoy the freedoms this country has to offer, but she will also spend a good portion of the rest of her life paying off the national debt even though she had nothing to do with its establishment or accumulation. Whether a recent arrival or a member of an old-line family, an inhabitant of a country cannot pick and choose among the country’s legacies. Certainly the nation’s largest and longest moral debt, slavery, carries over from generation to generation until it is paid off. There is a corporateness to any country that cannot be gainsaid.

Just as black Americans have supported redress for Native Americans and Japanese Americans, these groups owe a debt of gratitude to blacks.¹⁵⁸ But the obligation to support slave redress is deeper and broader than a simple quid pro quo. Most nonblack racial minorities are part of America’s immigrant experience. Like other immigrants, they assume the country’s legacies, both negative and positive. In addition, there is a sense in which nonblack persons of color benefit from the lingering effects of slavery more than blacks but less than whites. Indeed, some nonblack persons of color, as Frank Wu reminds us, have traded on their “honorary whiteness”—their closeness to the European ideal—and, in so doing, have “perpetuat[ed] the problem of race.”¹⁵⁹ Finally, like all Americans, Native Americans, Asians (including Pacific Islanders), and Latinos should support slave redress because it is simply the right thing to do.

157 Vivian B. Martin, *Everyone Stands to Gain from Reparations Debate*, HARTFORD COURANT, Nov. 7, 2002, at A17 (quoting a colleague).

158 See, e.g., Leslie T. Hatamiya, *Institutions and Interest Groups: Understanding the Passage of the Japanese American Redress Bill*, in WHEN SORRY ISN’T ENOUGH, *supra* note 7, at 190, 192.

159 FRANK WU, *YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE* 18 (2002).

2. Living Victims

Under the atonement model, the perpetrator's moral obligation to atone exists whether the victims are alive or dead. The perpetrator does not need living victims to trigger the duty to atone, although this could affect the nature of the reparations.¹⁶⁰ Once an atrocity is committed, the duty to atone is extinguished only when atonement is made. So long as the perpetrator or its (clearly established) successor-in-interest is alive, the atrocity's moral stain does not perish with the victims. The perpetrator still has something about which to atone. It is only the tender of atonement that retires the moral duty.

This principle is a bedrock of the international redress movement. It was based upon this principle that Polish President Aleksandr Kwasniewski felt the need a few years ago to atone on behalf of his government for a past atrocity for which his government was responsible. The act of atonement took place at a ceremony establishing a memorial honoring 1600 Jews murdered by Polish civilians on the eve of World War II. Though all the victims were dead, Kwasniewski offered this apology:

For this crime, we should beg *the souls of the dead* and their families for forgiveness. Today, as a man, citizen, and president of the Polish republic, I ask for pardon in my own name and in the name of those Polish people whose consciences are shocked by this crime.¹⁶¹

The imposition of a statute of limitations on the Polish government's duty to apologize would be improperly legalistic.¹⁶²

160 For example, if all the victims are dead, then rehabilitative reparations would seem to make more sense than compensatory reparations. See *supra* Part III.B for relevant discussion.

161 Ian Fisher, *At Site of Massacre, Polish Leader Asks Jews for Forgiveness*, N.Y. TIMES, July 11, 2001, at A1 (emphasis added).

162 This is not to say, however, that timing is irrelevant. Obviously, the closer the apology to the atrocity the more virtuous it is, because the perpetrator is now in a position to do something immediately about the consequences of the atrocity instead of allowing these negative effects to linger on for generations, if not centuries. Also, in terms of political considerations, the close proximity of the atrocity in time and space plus the fact that victims are alive would probably make it easier to pitch the idea of apology to the perpetrator than if the atrocity is ancient and the victims are all dead. But one can also argue that, as a strictly moral matter, a tender of apology when memories of the atrocity have long faded is more virtuous because the perpetrator is under no external pressure to issue it and, hence, it serves no self-interest, other than the fact that it retires the perpetrators' moral duty. When, as in the case of slavery, the atrocity's lingering effects create tangible disadvantage for an identifiable group in society, these additional external pressures may make it not only virtuous, but also necessary (or "affordable") for the government to act virtuously—that is, to do the right thing. This seems especially so if the disadvantaged group is able to exert

Two other considerations—one favoring the victim and the other favoring the perpetrator—add further support to the principle that the unfulfilled duty to atone survives the death of the victims so long as the perpetrator or its successor-in-interest is still alive. First, it would be a cruel irony if the perpetrator could absolve itself of the moral duty to apologize by simply wiping out all its victims. Second, the perpetrator should not be denied the opportunity for redemption if, for example, living victims decided, for one reason or another, not to come forward and make their presence known. Indeed, this happened with many of the Comfort Women during the early stages of their redress movement in Japan, although the Japanese Diet still refuses to issue an apology.¹⁶³ Again, redress under the atonement model is in a sense as much for the perpetrator as it is for the victim.

Finally, the form of reparation most appropriate for atonement purposes need be neither compensatory nor monetary to solidify the apology for slavery and Jim Crow. They can be rehabilitative and non-monetary.¹⁶⁴ An example is the “Museum of Slavery,” which would be established in Washington, D.C. and every state capital in the nation. The Museum would serve to educate the public about the slaves’ contribution to the greatness this nation has achieved in the twenty-first century.¹⁶⁵ Sadly, most Americans fail to see “racial slavery and its consequences as the basic reality, the grim and irrepressible theme governing both the settlement of the Western hemisphere and the emergence of a government and society in the United States that

substantial political pressure on the government either through electoral politics or acts of civil disobedience. Notwithstanding these considerations as to the most advantageous time in which to pitch apology, my fundamental point still holds—namely, the imposition of a statute of limitations on the moral duty to apologize is improperly legalistic.

163 See, e.g., George Hicks, *The Comfort Women Redress Movement*, in *WHEN SORRY ISN'T ENOUGH*, *supra* note 7, at 113, 113.

164 See *supra* Part III.

165 David Brion Davis, perhaps our leading historian on the institution of slavery, has observed that Americans fail to see “racial slavery and its consequences as the basic reality, the grim and irrepressible theme governing both the settlement of the Western hemisphere and the emergence of a government and society in the United States that white people have regarded as ‘free.’” DAVIS, *supra* note 147, at 168–69. David W. Blight sounds a similar note, arguing that our nation achieved a degree of unity after the Civil War at the expense of blacks. White Americans, North and South, were able to come together in the aftermath of that sectional struggle by celebrating the bravery and heroism of white soldiers in both the Union and the Confederacy, all the while minimizing the importance of slavery and the significance of its destruction. See DAVID W. BLIGHT, *RACE AND REUNION: THE CIVIL WAR IN AMERICAN MEMORY* 4–5 (2001).

white people have regarded as ‘free.’”¹⁶⁶ With a reparation like the Museum of Slavery, the not insurmountable problems of determining, calculating, and distributing money to every slave descendant that adhere in some monetary compensatory schemes would simply not arise.¹⁶⁷

To the extent that the redress is monetary, it could be rehabilitative rather than compensatory. A scholarship fund or an Atonement Trust Fund designed to meet the specific needs (such as education or venture capital) of a specific segment of black Americans (such as children or college students) for a specific period of time (such as five or ten years) would provide such rehabilitative redress. The authors’ keen observation that the beneficiaries of slave redress could be limited to those Americans who suffer a deficiency of social capital as a lingering effect of slavery (and I would add Jim Crow)—which would exclude white descendants of slaves and wealthy blacks who have been able to rise above the lingering effects of slavery and Jim Crow, but would include black non-descendants of slaves—could help to make monetary rehabilitative measures more viable.¹⁶⁸

B. *The Tort Model*

Much of what the public knows about slave redress comes from the early scholarship on the subject¹⁶⁹ and the recent rush of so-called “reparation” cases filed in federal and state courts.¹⁷⁰ These events speak to a particular path to slave redress, called the “tort model.” Yet, it is important to note, even some of the most well-known advo-

166 DAVIS, *supra* note 147, at 168–69.

167 See Posner & Vermeule, *supra* note 1, at 725–27; Darrell L. Pugh, *Collective Rehabilitation*, in WHEN SORRY ISN’T ENOUGH, *supra* note 7, at 372, 372.

168 See Posner & Vermeule, *supra* note 1, at 739–40. See *supra* text accompanying notes 153–60 for arguments regarding public support for slave redress.

169 The most influential works have been Robert Westley, *Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?*, 40 B.C. L. REV. 429 (1998), and Vincene Verdun, *If the Shoe Fits, Wear It: An Analysis of Reparations to African Americans*, 67 TUL. L. REV. 597 (1993). Though not high scholarship, RANDALL ROBINSON, *THE DEBT: WHAT AMERICA OWES TO BLACKS* (2000), and Charles Krauthammer, *Reparations for Black Americans*, TIME, Dec. 31, 1990, at 18, have certainly been influential. The authors’ work speaks more intelligently to writings in this cluster of scholarship, which has been eclipsed in recent years by atonement scholarship. See *supra* note 7.

170 See, e.g., *Alexander v. Governor of Okla.*, No. 03cv00133 (N.D. Okla. filed Feb. 24, 2003); *Farmer-Paellmann v. FleetBoston Fin. Corp.*, No. 1:02-1862 (E.D.N.Y. filed Mar. 26, 2002); *In re African-American Slave Descendants Litig.*, 231 F. Supp. 2d 1357 (J.P.M.L. 2002); *Hurdle v. FleetBoston Fin. Corp.*, No. CGC-02-412388 (Cal. Super. Ct. filed Sept. 10, 2002).

cates of the tort model, such as Randall Robinson and Charles Ogletree, have moved closer to the atonement model in recent years.¹⁷¹

Though it can appear in legislative form,¹⁷² the tort model is primarily a litigation approach to redress. In contrast to the atonement model, the tort model is less about apology than about settling the dispute. It is less about the perpetrator's atonement than about the victim's compensation. There is no expectation of perpetrator remorse, no opportunity for moral restoration, and no real hope for racial restoration. Proponents of the tort model would be satisfied if the government or a private beneficiary of slavery (a corporation or wealthy white family) simply wrote a check for *X* amount of dollars to every slave descendant.¹⁷³ In response, some white Americans, such as neoconservative Charles Krauthammer, would gladly have the government write that check as a means of closing the books on the American race problem—a kind of justice on the cheap.¹⁷⁴

While the authors note but do not discuss the formidable procedural barriers to litigating slave-redress claims,¹⁷⁵ and although they discuss the constitutional challenges such litigation (and legislation) will face should it survive the procedural barriers,¹⁷⁶ they do not delve into the legal doctrines on which this litigation is based, other than to suggest that restitutionary law will play a major role in resolving the substantive issues presented in the cases.¹⁷⁷ Other scholars have, however, looked closely at some of these substantive questions. In doing so, they have unearthed the normative underpinnings of the tort model the authors could not seem to find.¹⁷⁸

171 Both Robinson and Ogletree, as am I, are members of the Reparations Coordinating Committee, which prepared the complaint filed in *Alexander v. Governor of Oklahoma*, No. 03cv00133 (N.D. Okla. filed Feb. 24, 2003). That complaint requests an apology as well as specified reparations, although I would argue that an apology for atonement purposes, see *supra* text accompanying notes 117–18, cannot come at the barrel of a litigation gun. But it is most instructive to note that the leaders of the tort model are now moving in the direction of the atonement model by insisting on an apology in their speeches and when interviewed on television and radio. See generally ALFRED L. BROPHY, RECONSTRUCTING THE DREAMLAND: THE TULSA RACE RIOT OF 1921: RACE, REPARATIONS, AND RECONCILIATION (2002) (discussing the background of the lawsuit).

172 A legislative illustration of the tort model can be found in the Rosewood Compensation Act of 1994, discussed *supra* notes 25 & 88.

173 But see *supra* note 171 (discussing the Robinson and Ogletree movement toward the atonement model).

174 See Krauthammer, *supra* note 169, at 18.

175 See Posner & Vermeule, *supra* note 1, at 691.

176 See *supra* Part I.B.

177 See Posner & Vermeule, *supra* note 1, at 702–03.

178 See *id.* at 690.

In examining slave-redress lawsuits, some legal scholars in the field of remedies have sought to find creative ways to shape legal doctrines into sustainable rights of action for slave descendants. Anthony Sebok, for example, argues that the doctrine of unjust enrichment is “viable” against corporate defendants. He gives two reasons for this conclusion. First, questions of proof may be easier to resolve in plaintiffs’ favor because corporations usually maintain good records (although let us not forget the paper shredding that went on at Enron). This “makes it relatively easy to track how a dollar wrongfully gained 200 years ago was reinvested until today.”¹⁷⁹ Second, styled as a lawsuit that seeks redress for the wrongful gains held by the perpetrator—in other words, a “gain-based lawsuit” as opposed to a “harm-based lawsuit,” which focuses on the harms sustained by the victim as a result of the perpetrator’s acts—a private action against a corporate defendant provides a cognizable right of action under the law of restitution.¹⁸⁰

Another remedies scholar, Hanoch Dagan, argues in a similar vein.¹⁸¹ He maintains that, given the correlative relationship between legal rights and legal remedies—the “correlativity thesis”—restitution must be regarded as “the notional equivalent at the remedial stage of the right that has been wrongly infringed.”¹⁸² Remedies concretize rights; they make rights meaningful. If the law were to allow the perpetrator of an atrocity to retain his ill-gotten gains that would not only stand as a “sequel” to the corrupt laws that made the atrocity possible, but it would also constitute their “present embodiment.” Thus, finding a recovery in law for slavery provides a credibility check on the “integrity and moral significance” of the extant law.¹⁸³

The normative stance of the tort model is clear. If the laws protecting slavery and racial segregation were morally corrupt (as the authors seem to recognize), then slave-redress claims *must* be cognizable under the extant law; otherwise the latter stands as “sequel” to and the “present embodiment” of America’s worst atrocity and the corrupt laws that made that atrocity possible. Hence, the tort model presents a credibility check on the integrity of our current legal system. In this

179 Sebok, *Prosaic Justice*, *supra* note 7, at 51.

180 *See id.*; *see also* Sebok, *Brooklyn Slavery Class Action*, *supra* note 7 (discussing claims of conversion and unjust enrichment against corporate defendant). In *Moses v. MacFerlan*, 97 Eng. Rep. 676, 681 (K.B. 1760), Lord Mansfield said, by way of dictum, that “[d]efendant[s] upon the circumstances of the case [are] obliged by the ties of natural justice and equity to refund the money.”

181 Dagan, *supra* note 7, at 42.

182 *Id.* at 43.

183 *Id.*

sense, the tort model is similar to the Supreme Court's landmark school desegregation case of *Brown v. Board of Education*,¹⁸⁴ which also challenged the extant law's morality.

CONCLUSION

Though the authors set out "to provide all participants in . . . [the redress] debates with analytic tools that may be used to sort out the good normative arguments from the bad,"¹⁸⁵ they, in fact, provide defective analytic tools. Rather than present the reader with "an accurate map of the intellectual terrain,"¹⁸⁶ the authors present a conceptually flawed definition of reparations,¹⁸⁷ disregard important historical¹⁸⁸ and global¹⁸⁹ contextualization, fail to make crucial distinctions in the forms of redress,¹⁹⁰ and flat out omit the models of redress and their concomitant normative positions.¹⁹¹

Because of these analytic weaknesses, the authors arrive at an ill-advised conclusion regarding the relationship between the legitimacy or propriety of redress and the means of achieving redress. The authors conclude that "a normative recommendation for or against any particular grant of reparations must be highly sensitive to the question of how the reparations scheme is to be designed."¹⁹² That is so *very* wrong. The merits of redress in a given context, for instance slavery or Jim Crow, can and *should* be determined without regard to the design of a specific form of redress. To be sure, these matters are related, especially in the context of the atonement model.¹⁹³ But even in that context, it is cleaner both conceptually and factually to consider the perpetrator's moral obligation to atone without regard to the specific manner in which the perpetrator chooses to concretize its remorse.¹⁹⁴

184 347 U.S. 483 (1954).

185 Posner & Vermeule, *supra* note 1, at 689.

186 *Id.* at 747.

187 *See supra* Part I.A.

188 *See supra* Part II.A–C.

189 *See supra* Part II.D.

190 *See supra* Part III.

191 *See supra* Part IV.

192 Posner & Vermeule, *supra* note 1, at 689.

193 *See supra* Part I.A.

194 The form of redress gives content to the meaning of redress, just as the remedy in a lawsuit gives content to the rights established therein. *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282 (1976) ("Right and remedy are interdependent."). Yet, the issue of liability is typically viewed as a distinct adjudicatory consideration, separate from the issue of remedy.

The debate on slave redress would be more clarifying if Americans were to simply focus initially on the moral obligation of the federal government to atone for slavery and Jim Crow. This, in fact, has been the pattern of successful redress movements in other parts of the world, such as Germany¹⁹⁵ and South Africa.¹⁹⁶ It is also the strategy of the only successful redress movement in the United States—the Japanese American Redress Movement.¹⁹⁷ Indeed, leaders of the Japanese American Redress Movement credit the success of their movement to the separation of the normative question from the design question:

Some have been disappointed that no recommendations for redress were contained in the [congressional] report and have been critical of this omission. The omission, of course, was deliberate, and I think that the Commission's strategy was both logical and effective. Had the report contained recommendations—especially recommendations involving monetary redress—public attention would have been diverted from the report's historical conclusions and focused on the proposed remedies. It was important that the Commission's conclusions . . . be disseminated as widely as possible. With that accomplished, a predicate has been established for the Commission to perform its second task, to make its recommendations to the Congress.¹⁹⁸

The great lesson of redress movements is that once we understand the necessity of redress—i.e., agree in principle that redress *should* be made for moral and civic reasons¹⁹⁹—then, and only then, can we consider how the perpetrator can demonstrate the depth of its sincerity. It is only through this high-minded discussion of morality and justice that any society is able to consider the forms of redress, in all their possible configurations, with probity and intelligence.

195 See WHEN SORRY ISN'T ENOUGH, *supra* note 7, at 13–81.

196 See *id.* at 439–510.

197 See *id.* at 153–228.

198 Roger Daniels, *Relocation, Redress, and the Report: A Historical Appraisal*, in WHEN SORRY ISN'T ENOUGH, *supra* note 7, at 183, 186.

199 Much of this decision will be based upon a clarification of the historical record; in other words, an understanding of the nature and magnitude of the atrocity, including its lingering effects. This comes out in the apology. See *supra* text accompanying notes 117–18.