January 2004

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Recommended Citation

Link to publisher version (DO1)
https://doi.org/10.15779/Z38S036

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Toward A Perpetrator-Focused Model of Slave Redress

Roy L. Brooks*

I. INTRODUCTION

When most Americans think of “black reparations” or “slave redress”—meaning redress for slavery and Jim Crow—they envision a victim-focused model. This approach to slave redress—the “tort model”—is essentially compensatory and backward-looking. Past and present, the tort model has

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1. The term “redress” refers to the range of responses governments made (or have been asked to make) regarding their past atrocities. “Reparations” is merely one way in which an atrocity’s perpetrator can provide redress. It is not the only way. Because many scholars and the public at large fail to recognize the distinction between redress and reparations, their use of the latter term tends to be over-inclusive. For further discussion, see ROY L. BROOKS, The Age of Apology, in WHEN SORRY ISN’T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND HUMAN INJUSTICE 8-9 (Roy L. Brooks ed., 1999) [hereinafter WHEN SORRY ISN’T ENOUGH].


been African Americans' primary approach to achieving slave redress. Proponents of the tort model would, for the most part, be satisfied if the government or a private party (e.g., a corporation) who profited from slavery simply wrote a check for X amount of dollars to every descendant of a slave. 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—racial justice on the cheap.  

Although the tort model has thus far been the slave-redress model of choice for African Americans, it should not be the model of the future. In the future, African Americans should adopt a perpetrator-focused rather than a victim-focused redress model. Slave redress should be conciliatory rather than compensatory or punitive, forward-looking rather than backward-looking. In other words, it should be about atonement, forgiveness, and the prospect for racial reconciliation (hereinafter the "atonement model").

The atonement model is morally and socially superior to the tort model. Unlike the latter, it stares slavery and Jim Crow in the face. It gives posthumous meaning to the lives and deaths of the slaves. It lays the foundation for repairing a broken relationship between victim and perpetrator. In the end, African Americans and society in toto receive much more under the atonement model than under the tort model.  

In this essay, I shall explain why I believe the tort model, our current approach to slave redress, is misdirected. I shall also explain the direction in which I believe slave redress should move. After setting forth the major features of the tort model (Part II) and its normative deficiencies (Part III), the essay briefly outlines the contours of the atonement model (Part IV).  

My objective is to indicate the direction—the tenor and terms of the discussion—I believe the debate on slave redress should take.

District of Illinois pursuant to 28 U.S.C. § 1407. See In re African-American Litig. 02-CV-7764 (N.D. Ill.), Minute Order dated January 17, 2003, transferring: 02c6180 [Porter], 02c7765 [Barber], 02c7766 [Farmer-Paellmann], 02c7767 [Carrington], 02c9180 [Johnson], 02c9181 [Bankhead], and recently transferred Hurdle v. FleetBoston Fin. Corp. [02-CV-4653]. Other victims of historical injustices have also pursued this approach. See generally BROOKS, WHEN SORRY ISN'T ENOUGH, supra note 1, at 61-67 (litigation against Germany), 117-19 (litigation against Japan), 168, 206-15 (Japanese-American litigation against the United States), 261-79 (Native-American litigation against the United States).

5. See generally Krauthammer, supra note 2.


7. ROY L. BROOKS, ATONEMENT AND FORGIVENESS: A NEW MODEL FOR BLACK REPARATIONS (forthcoming 2004) (discussing the atonement model in greater detail) [hereafter ATONEMENT AND FORGIVENESS].
II. THE TORT MODEL’S MAJOR FEATURES

Although primarily a litigation approach to slave redress, the tort model can appear in the legislative context as well. The Rosewood Compensation Act of 1994 is one important legislative expression of the tort model. Under that Act, the Florida legislature provided funds to compensate African Americans who lost property as a result of a race riot that demolished the all-black Florida town of Rosewood in 1921. Significantly, the Act did not include an apology to the victims of the atrocity, many of whom were still living. Instead, the Rosewood Compensation Act, like all applications of the tort model that do not seek punishment, emphasized victim compensation.

There is little question that litigation has been, and continues to be, the primary application of the tort model in the United States. Indeed, slave-redress litigation has proliferated in recent years. Cases have been filed against the federal government and state governments for authorizing, protecting, and prolonging slavery and Jim Crow. These cases are best classified as “public actions”—actions brought against public parties. Plaintiffs have also brought cases against corporations, seeking to reclaim unjust profits that corporate predecessors-in-interest received from doing slave-related business. These cases can be termed “private actions”—actions against private, nongovernmental entities.

A. Public Actions for Slave Redress & their Procedural Hurdles

Every public action for slave redress that has been decided thus far has been dismissed. These dismissals have been based on a variety of procedural grounds—for example, lack of standing, absence of subject matter jurisdiction,
failure to state a legally cognizable claim, expiration of applicable statutes of limitations, nonjusticiability, and sovereign immunity. Each dismissal occurred during the pretrial stage of the litigation. Thus, the judges have disposed of each action without reaching the merits of the dispute.

Perhaps the most thorough legal analysis of the procedural hurdles plaintiffs face in public actions for slave redress is provided in Berry v. United States. Filed pro se in federal court in 1994, Berry styled his action as a class action representing the descendants of slaves. Despite plaintiff's desire to bring this case as a class action lawsuit, the case proceeded as an individual action, because a pro se plaintiff can represent herself and no other.

Plaintiff sought to quiet title to forty acres of United States land located in San Francisco or, in the alternative, three million dollars in damages. Subject matter jurisdiction was invoked under Article III of the Constitution, the Thirteenth and Fourteenth Amendments, and the Freedmen's Bureau Act of 1865. Section Four of the Freedmen's Bureau Act 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."

Plaintiff's request for redress in the form of land was particularly problematic. There is, in some western legal systems, a general indisposition toward taking land away from the current owner, especially when he or she has been in possession of the land for a long period of time. For all the reparations it granted to victims of Nazi persecution, Germany, for example, balked at the thought of returning a valuable piece of German real estate to its rightful Jewish owners sixty years after the theft. However, the return of land

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14. See, e.g., Johnson, 45 U.S. App. D.C. at 440; Berry, 1994 WL 374537, at *1; Cato, 70 F.3d at 1103.
15. Id.
17. Id. .
18. Id.
19. Id.
20. Id.
21. Id. at *2.
22. Id. at *1 (citing § 4 of the Act of March 3, 1865, ch. 90, 13 Stat. 507).
23. See Special Field Order No. 15, in WHEN SORRY ISN'T ENOUGH, supra note 1, at 365-66.
24. See, e.g., infra text accompanying notes 87-91 (discussing the good faith purchaser doctrine).
25. See Greg Steinmetz, One Family's Battle for Ancestral Land Poses Hard Questions,
as a form of redress is not unheard of in western law. South Africa created an extensive program of land restitution, including the creation of a commission and judicial tribunal with powers to return privately as well as publicly held lands to their rightful owners.\textsuperscript{26} Though certainly not as extensive as South Africa, the United States has returned land to Native Americans.\textsuperscript{27} But plaintiff Mark Berry may have gone too far in asking for forty acres of valuable federal land in San Francisco upon which the Federal Building, the U.S. Mint Building, and the U.S. Naval Station (Treasure Island) currently sit. Hedging his bet, plaintiff asked for three million dollars in the alternative.\textsuperscript{28}

Due to plaintiff's \textit{pro se} status, District Court Judge Jensen suggested legal arguments on behalf of plaintiff, but in the end dismissed all claims on procedural grounds without commenting on the merits.\textsuperscript{29} Judge Jensen ruled that none of the jurisdictional bases on which plaintiff relied were in fact jurisdictional.\textsuperscript{30} Article III of the Constitution, the Thirteenth and Fourteenth Amendments, and the Freedmen's Bureau Act did not confer subject matter jurisdiction on the court to hear plaintiff's property claim.\textsuperscript{31} Each, instead, provided a right of action (a legal claim) that required an established jurisdictional base (judicial authority to hear the claim) if it was to be heard in federal court.\textsuperscript{32}

Judge Jensen considered two jurisdictional statutes. The first, the Tucker Act,\textsuperscript{33} provides that U.S. District Courts and the U.S. Court of Federal Claims shall have original jurisdiction in civil actions against the United States founded upon the Constitution or any "Act of Congress" where money damages do not exceed ten thousand dollars.\textsuperscript{34} The phrase "Act of Congress" did not, however, include discontinued statutes like the Freedmen's Bureau Act, which expired on July 17, 1869, after several extensions by Congress.\textsuperscript{35} Thus, the court lacked subject matter jurisdiction, and the plaintiff had no

\begin{itemize}
  \item 27. For example, in March of 2002, Secretary of the Interior Gale Norton stated the federal government's willingness to return 692,000 acres of public land to the Klamath Tribes of Oregon: "Klamath Tribes have property rights that must... be honored...," \textit{Klamath Tribes May Get Land Back}, SAN DIEGO UNION-TRIBUNE, Mar. 20, 2002, at A6.
  \item 28. Berry, 1994 WL 374537, at *2.
  \item 29. \textit{id.} at *3.
  \item 30. \textit{id.} at *2.
  \item 31. \textit{id.} at *3.
  \item 32. \textit{id.}
  \item 33. 28 U.S.C. § 1346(a)(2).
  \item 34. Berry, 1994 WL 374537, at *2; 28 U.S.C. § 1346(a)(2).
  \item 35. Berry, 1994 WL 374537, at *1-2.
\end{itemize}
viable right of action based on that Reconstruction Era statute.\textsuperscript{36} Furthermore, even if the plaintiff had a claim under the Freedmen’s Bureau Act, the six-year statute of limitations for civil actions against the federal government would bar such a claim.\textsuperscript{37} The six-year statute of limitations accrued, Judge Jensen said, “when plaintiff’s ancestors allegedly did not receive land under the Freedmen’s Bureau Act, last enforced in 1869. There is no question that more than six years has passed since then.”\textsuperscript{38}

The second jurisdictional statute to which Judge Jensen turned was the Quiet Title Act,\textsuperscript{39} which, in conjunction with a provision of the Tucker Act,\textsuperscript{40} confers jurisdiction on district courts to quiet title to land in which the United States has an interest. The Quiet Title Act did not apply in this case, however, because it is inapplicable to “actions that could have been brought under the Tucker Act.”\textsuperscript{41} And even if the Quiet Title Act did apply, “plaintiff’s claim is jurisdictionally barred by the [twelve-year] time limitation . . . of the Act.”\textsuperscript{42}

Basing a slave-redress claim on the Freedmen’s Bureau Act was problematic for yet another reason. Even if the Act were still in effect, it only covers claims regarding land “within the insurrectionary states” and alleging the payment of rent or a purchase price.\textsuperscript{43} Plaintiff claimed title to land located in California (not an insurrectionary state), and did not allege the payment of rent or a purchase price.\textsuperscript{44}

The court did not consider, as perhaps it should have, whether the applicable statutes of limitations were subject to equitable tolling based on the conditions of the newly freed slaves and the racial climate from the end of Reconstruction to the end of the Civil Rights Movement. The equitable tolling doctrine permits plaintiffs to file an action after the expiration of the applicable statute of limitations if they were prevented from making a timely filing due to extraordinary circumstances.\textsuperscript{45} Were plaintiff’s slave ancestors tricked or induced to forgo filing a lawsuit by any misconduct on the federal government’s part? Did the government turn a deaf ear to repeated requests for information about the status of its promise of “forty acres and a mule?”\textsuperscript{46}

\textsuperscript{36} Id. at *2-3.
\textsuperscript{37} Id. at *3 (citing 28 U.S.C. § 2401(a)).
\textsuperscript{38} Id. at *3.
\textsuperscript{40} 28 U.S.C. § 1346(f) (2000).
\textsuperscript{43} Berry, 1994 WL 374537, at *3.
\textsuperscript{44} Id.
\textsuperscript{45} 51 AM. JUR. 2D Limitation of Actions § 174 (2000).
\textsuperscript{46} See the “Gold Train” case, Rosner v. United States, No. 01-1859-CIV-SEITZ, 2002 U.S. Dist. LEXIS 17632 (S.D. Fla. Aug. 28, 2002) (tolling the statute of limitations on these grounds in a class action brought by Hungarian Jews against the U.S. to recover personal property stolen by the pro-Nazi Hungarian government during World War II and subsequently seized and sold by the U.S.).
Nonetheless, given the expiration of the Freedmen’s Bureau Act and the absence of a property right of action under the constitutional provisions alleged in the complaint, one could understand why Judge Jensen did not consider the equitable tolling question.

Having dismissed the lawsuit on jurisdictional grounds, Judge Jensen did not reach the question of sovereign immunity. He did, however, make two comments on the question. First, he observed in a footnote that, “If either the Quiet Title Act or the Tucker Act is held to confer jurisdiction on the Court, . . . both Acts have been construed as a waiver of sovereign immunity.”

Second, Judge Jensen noted that the Bivens doctrine does not waive sovereign immunity. That doctrine, which creates a constitutional right of action under certain conditions, only waives the immunity of federal agents. In fact, according to Judge Jensen, the Supreme Court in Bivens refused to rule on the question of sovereign immunity.

Finally, Judge Jensen rejected plaintiff’s argument that, if Japanese Americans and Indian tribes are entitled to redress, so are African Americans. Redress in those cases, the judge observed, “was authorized by existing Congressional statutes specifically addressing those topics.” The court, in short, could find no procedural basis on which to permit the case to proceed to its merits. Berry, thus, illustrates some of the myriad procedural hurdles that prevent plaintiffs from bringing public actions for slave redress.

B. Private Actions for Slave Redress

1. Considerations Regarding Procedural Law

Rather than face formidable procedural hurdles in suing the government, particularly the federal government, African Americans devised a new litigation strategy in slave-redress cases—suing private entities, mainly corporations—that have profited from slavery. Corporations named in these dozen or so private actions include: commercial banks (such as FleetBoston Financial Corporation); investment banks (such as J.P. Morgan Chase & Co., Lehman Brothers Holdings, Inc., and Brown Brothers Harriman); tobacco

47. Berry, 1994 WL 374537, at *2 n.3 (cases cited therein).
48. Id.
50. Berry, 1994 WL 374537, at *4 n.3.
51. See id. It appears, however, that the Supreme Court in Bivens only decided the Rule 12(b)(6) issue and did not decide any immunity issue—official or sovereign immunity—because the court of appeals only passed upon the former matter. See Bivens, 403 U.S., at 397-98 (“[The official immunity] question was not passed upon by the Court of Appeals, and accordingly we do not consider it here.”).
52. Berry, 1994 WL 374537, at *4 n.4.
companies (such as R.J. Reynolds Tobacco Holdings, Inc., Brown & Williamson Tobacco Corp., and Liggett Group, which is now indirectly owned by Vector Group Ltd.); insurance companies (such as Aetna, Inc., Lloyds of London, and American International Group); railroads (such as CSX, Union Pacific, and Norfolk Southern Corp.); and textiles (such as Westpoint Stevens, Inc.). Plaintiffs in these private actions allege that corporate defendants are successors-in-interest to corporations that profited from slavery by, inter alia, insuring slaveholders against the loss of slave “property” and using slaves to build their railroads or make their products.\textsuperscript{54}

I shall discuss private-action cases collectively because these cases have not yet resulted in a decision or judicial opinion. Most of the private actions filed thus far have been class actions. In the first of this genre of lawsuit, the named plaintiff, Deadria Farmer-Paellmann, brought an action in federal court in New York City on behalf of herself and all other “African-American slave descendants . . . whose ancestors were enslaved in the agricultural industry.”\textsuperscript{55} On the other side of the country, Timothy and Chester Hurdle, whose father Andrew Hurdle was a slave, filed a slave-redress lawsuit in federal court in San Francisco.\textsuperscript{56} Plaintiffs in this case are unique in that they learned of slavery first-hand through their fathers’ personal suffering.\textsuperscript{57}

Though the class of plaintiffs and specific claims alleged in most of the private actions are different, they face common procedural complications under the extant law. The most significant complication being that, private actions, like public actions, do not have clear actionable claims, or rights of action, and they may be time-barred by applicable statutes of limitations. Yet, private actions have several procedural advantages over public actions. The former do not, for example, face the problem of subject matter jurisdiction based on the defense of sovereign immunity. As corporate defendants are not government entities, they cannot claim this defense. The federal court’s constitutional authority to decide private actions is usually predicated on the diversity of citizenship statute.\textsuperscript{58} This statute grants federal courts subject matter jurisdiction over claims brought by citizens of different states, provided the amount in controversy exceeds seventy-five thousand dollars.\textsuperscript{59} Procedural hurdles are not the only legal problems private actions face. The substantive law also presents significant obstacles for these actions. A few considerations follow.

\textsuperscript{54} See supra note 53.
\textsuperscript{55} Farmer-Paellmann, C.A. No. 1:02-1862, at complaint ¶ 25-26 (Jury trial demanded.)
\textsuperscript{56} Hurdle, Case No. CGC-02-412388.
\textsuperscript{57} Id.
\textsuperscript{59} Id.
2. Considerations Regarding the Substantive Law

The right of action alleged in private actions is characteristically based on international law and Anglo-American common law—lex non scripto (the unwritten law)—rather than statutory or constitutional law—lex scripto (the written law). International human rights include freedom from torture, rape, starvation, physical and mental abuse, summary execution, and forced labor. Common law claims include quantum meruit, conversion, and unjust enrichment. Thus, plaintiffs may claim that even though slavery was legal as a matter of lex scripto, slavery, or some aspects of it, was illegal as a matter of lex non scripto and international law.

Several innovative legal theories suggest that it may be possible for plaintiffs to win private actions on the merits. Some of these theories also indicate how plaintiffs may be able to overcome procedural obstacles.

3. Innovative Legal Theories for Success on the Merits

Legal theories regarding the substantive law seem more intriguing than those regarding the procedural law. One such substantive theory broadly concerns the excesses of slavery. Another one looks slavery straight in the eye, and marshals a frontal attack on the peculiar institution.

a. Attacking the Excesses of Slavery

Attacking the excesses of slavery may seem nonsensical given the fact that slavery was legal under international law when practiced in the United States, and given the commonly perceived legal status of African Americans during slavery. Chief Justice Roger Taney purported to summarize the legal status of African Americans when, in 1857, he wrote that even emancipated African Americans were "beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior that they had no rights which the white man was bound to respect." As a generalization about the legal rights of African Americans before and after the American Revolution, Taney, as one scholar notes, "offered an illusory picture of certainty about the Negro's status in that earlier age." Quite simply, free Blacks and slaves alike had rights at the state level (both under the

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60. The best discussion I have seen concerning the status of slavery per se as a violation of customary international law as opposed to a violation of natural law, which at times was equated with the notion of jus gentium (or law of nations), is an unsigned student note. See American Slavery and Conflicts of Laws, 71 Colum. L. Rev. 74 (1971).
61. I have yet to see a private action based on Jim Crow. Alexander is a public action brought against Jim Crow. No. 03cv00133.
62. See BROOKS, ATONEMENT AND FORGIVENESS, supra note 7, at Ch 4.
written and unwritten law) which the white man was bound by law to respect. The difficulties lie in identifying these rights and determining whether they provide a right of action.

Some scholars suggest that there was enough uncertainty about the legal rights of an African American—"not merely because he was both perishable and expensive but because of uncertainty as to just how much of him was property and how much humanity"—that a judge looking at this body of law today and of a mind to uphold slave redress could find sufficient grounds for doing so. It may be, for example, that human bondage was legal under both international law and domestic common law, but the excesses of slavery as practiced on many plantations—working slaves to death, torture, rape, and malicious murder—were not.

To successfully attack the excesses of slavery today, African Americans may need judges (or justices) of the caliber of Chief Justice Marshall, who exhibited the capacity "for giving a veneer of reasoned inevitability to a tortuous logical path" in the interest of justice and fairness. This judicial technique seemingly was employed during slavery by Judge Leonard Henderson, a justice on the North Carolina Supreme Court during the antebellum period and its Chief Justice from 1829 to 1833. Combining dubious legal footwork with analysis that suggests judicial restraint, Judge Henderson extended the common law of England—protecting the freedom of Blacks so long as they remained in England—to sustain the conviction of a white man for murdering a slave. The crime was actionable under the common law, but not expressly under the state statutory law. To ensure that the murderer got his just desserts, Judge Henderson ruled that absent a controlling statute, the common law itself protected the slave not from slavery, but from his master's madness:

There is no statute on the subject, it is the Common Law, cut down, it is true, by statute or custom, so as to tolerate slavery, yielding to the owner the services of the slave, and any right incident thereto as necessary for its full enjoyment, but protecting the life and limbs of the human being; and in these particulars, it does not admit that he is without the protection of the law. I think, therefore, that judgment of death should be pronounced against the prisoner.

Just six months later, the North Carolina Supreme Court extended this

65. See id. for a detailed discussion.
66. Id. at 202.
67. Id. at 208. The reference is to Justice Marshall's signature opinion in Marbury v. Madison, 5 U.S. 137, 2 L.Ed. 60 (1803), in which, through clever legal footwork, he discovers the doctrine of judicial review in the Constitution.
68. See Henderson County Public Library website at http://www.henderson.lib.nc.us/countyfacts.htm#name.
69. See State v. Reed, 9 N.C. 454, 455-57 (1823).
70. See id. at 456. For a different reading of the opinion, see Nash, supra note 64, at 209.
common-law right to protect the slave from assault and battery by whites other than his master. Thus, Chief Justice Taney's statements were not entirely correct. In some jurisdictions slaves did have rights, albeit common law rights, which the white man was bound to respect. Accordingly, if a private-action plaintiff can show that his ancestor slave-laborer was wantonly killed by a defendant corporation or its predecessor-in-interest, this might give rise to a wrongful death action, assuming, the absence of procedural barriers.

b. Attacking Slavery Head-On: A Restitutionary Claim for Gains-Based Unjust Enrichment

Rather than attacking the excesses of slavery, a frontal attack on the institution of slavery itself using common-law doctrine may be possible. Some legal remedies scholars have argued that ample space within the palace of justice can be found to accommodate these cases without constructing additional rooms. 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 "make[s] it relatively easy to track how a dollar wrongfully gained 200 years ago was reinvested until today." Second, a private action against a corporate defendant that seeks redress for the wrongful gains held by the perpetrators provides a cognizable right of action under the law of restitution. Such a "gains-based lawsuit" focuses on perpetrators, as opposed to a "harm-based lawsuit" that focuses on the harms sustained by the victim as a result of the perpetrators' acts.

i. The Commodification Question

Common-law precedents suggest the existence of a restitutionary claim in private actions. Sebok cites, for example, Lord Mansfield's dictum in the 1760 case of Moses v. MacFarlen, that, "Defendants[,] upon the circumstances of

71. See State v. Hale, 9 N.C. (2 Hawks) 582 (1823).
72. Anthony J. Sebok, Prosaic Justice, LEGAL AFFAIRS, Sept./Oct. 2002, at 52 [hereinafter Prosaic Justice]. Unjust enrichment is defined as circumstances which give rise to the obligation of restitution, such that one "should be required to make restitution of or for property or benefits received, retained or appropriated, ... which in justice and equity belong to another." BLACK'S LAW DICTIONARY 1377 (5th ed. 1979). "A person who has been unjustly enriched at the expense of another is required to ... [provide redress] to the other." Kämmer Asphalt Paving Co. v. E. China Township Sch., 504 N.W.2d 635, 640 (Mich. 1993).
73. Prosaic Justice, supra note 72, at 52.
74. Id.
the case[,] are obliged by the ties of natural justice in equity to refund the money represented by the intangible thing they took. But, Sebok raises an important moral issue, which could be called the “commodification question.” The equitable theory of unjust enrichment, Sebok argues, commodifies the wrongs of slavery, which he correctly views as essentially a human rights matter, because it necessarily entails the use of “the quotidian language of property and restitution law.” In other words, Sebok believes that:

[T]he language of restitution implies . . . that the claim is not about forcing the slaves to labor, but rather about failing to pay for the work they did . . . Thus, . . . restitution claims commodify the horrors of . . . Slavery by implying that the wrong committed is the retention of property that has been wrongfully taken, rather than the violation of human rights, the destruction of culture, and the oppression of people . . . [In short,] “employing a legal tactic that frames the right to freedom in terms of the right to property” may end up degrading the human values at stake and sapping the moral language of the reparations movement.

Dagan answers the commodification question, or what some have called the “blood money” issue, in a most creative fashion. Restitutionary claims do not trivialize slavery by “reducing them to prosaic grievance about unpaid wages,” Dagan argues, because these claims are in reality not about the value of the victim’s labor to her master, but, rather, they speak to the value of the victim’s labor to herself. Restitution in private actions vindicates the victim’s right to be free from wrongful interference with her inalienable right to control her labor—whom she shall work for and under what conditions. Dagan asserts that “[d]enying restitution for the wrongful appropriation of human labor” in the context of slavery “would not elevate human labor above the marketplace, but rather [would] shift the entitlement to its beneficial use [from] the wrongful appropriator.”

ii. The Correlativity Thesis

Given the correlative relationship between legal rights and legal

77. Id. at 681. For other common-law precedents, see restitution scholar Hanoch Dagan, The Law and Ethics of Restitution 42 (draft of December 30, 2002) (unpublished chapter, on file with author) [hereinafter Dagan].
78. Prosaic Justice, supra note 72, at 51.
79. Id.
81. See ROY L. BROOKS, The Age of Apology, in WHEN SORRY ISN'T ENOUGH, supra note 1, at 6.
82. Dagan, supra note 77, at 41.
83. Id. at 43.
remedies—what is called the “correlativity thesis”—restitution must be regarded as “the notional equivalent at the remedial stage of the right that has been wrongly infringed.” Remedies make rights concrete and meaningful. If the law allows an atrocity’s perpetrator to retain his ill-gotten gains, the perpetrator’s enrichment not only stands as a “sequel” to the atrocity—and, in the case of slavery, the corrupt laws that made the atrocity possible—but also stands as the “present embodiment” of the atrocity. Thus, finding a recovery in law for slavery provides “a credibility check” on the “integrity and moral significance” of the extant law.

iii. The Good Faith Purchaser Doctrine

What about the fact that slave descendants are not the direct victims of slavery? What do we make of the “good faith purchaser doctrine” that cuts off intergenerational claims? Dagan provides an easy answer to the first question: “I do not think that this difficulty should block the suit of the slave descendants. The inheritability of the right to gains-based recovery has been recognized . . . in another context that involves an entitlement of the incomplete commodification type, namely: the right of publicity.” Similar to the equitable tolling of a statute of limitations, the good faith purchaser doctrine “balances the moral importance of present claims with past injustices.” The decision here is one of distributive justice. That is, under the doctrine, the disputed asset remains with the current owner if she had no knowledge of the original owner’s (i.e., the slave’s) conflicting claim and if she can show that her losses (should the asset be taken away from her) are equal to “the losses likely to be suffered by the original owner” (or in the case of slavery, the slave descendant). The current owner’s loss includes the value she put into the purchase of the asset and the value she spent in reliance on her ownership of the asset. Someone who inherits an ill-gotten asset puts less value into the asset than a person who purchases the asset, even though both may value the asset equally.

Dagan argues that balancing competing hardships should favor slave descendants over corporate defendants in private actions because the latter are “direct recipient[s] of wrongful gains from slavery.” Such privity is based upon the institutional continuity of a corporation—its “fictive legal personality, unlimited life, and successorship in the event of merger or acquisition.”

84. Id.
85. Id.
86. Dagan, supra note 77, at 44.
87. Id. at 46 n.156 (sources cited therein).
88. Id. at 48-49.
89. Id. at 49-50. See also 77 AM. JUR. 2D Vendor and Purchaser §§ 425, 426 (2000).
90. Dagan, supra note 77, at 50.
91. Id.
92. Id. at 51.
93. Id.
contrast, most individual owners of slave assets (whether land or slave-labor benefits) are unaware that they own tainted assets.94 The successful use of the good faith purchaser doctrine is therefore more probable for them.95 What this means, Dagan suggests, is that "the fine-points of the law of restitution" may have motivated the plaintiffs' attorneys in the private law actions to sue corporations that build their fortunes on slavery rather than to sue any other of the "countless people in the United States today who own land, buildings, and other assets that originally belonged to slave owners."96 The choice of defendant was not, in short, "opportunistic and morally arbitrary."97

iv. New Technologies and the Statute of Limitations

As in the case of public actions,98 the statute of limitations is an important procedural barrier in private actions. Sebok argues that new technologies giving plaintiffs an opportunity to discover the defendant corporations' unjust gains may equitably toll applicable statutes of limitations.99 If this argument works in private actions, it is difficult to see why it would not work in public actions as well. Yet, Dagan concludes that, "To the best of my knowledge, there is no case law on the question of whether a statute of limitations can be tolled by the emergence of new evidence previously unknown because of undeveloped technologies."100 While citing a number of rules that prevent the limitations period from accruing—for example, where the gain was fraudulently concealed or, in the absence of such fraud, the plaintiff was ignorant of the pertinent facts due to no fault of his own—or that allow the limitations period to be extended—such as where "justice demands, which usually requires an element of [further] wrongdoing by the defendant," Dagan is rightfully cautious of Sebok's argument due to the lack of a clear precedent.

4. Summary

Private actions face fewer procedural hurdles than public actions and, for that reason, seem more sustainable. Indeed, courts might sustain private actions against corporations by using many creative theories. Common-law theories that attack particular excesses of slavery may provide viable causes of action. A gain-based claim of unjust enrichment—one that focuses on the wrongful taking of the slave's inalienable right to control his labor rather than

94. See id. at 50.
95. See id. at 49-51.
96. See id. at 47.
97. See id. 47, 50.
98. See supra text accompanying notes 13-14, 36-42.
99. See Prosaic Justice, supra note 72, at 51; Sebok, supra note 75. Many private-action complaints contain the new technology allegation. See, e.g., Farmer-Paellmann, C.A. No. 1:02-1862, at complaint ¶ 45, 46.
the failure to pay wages—could provide a sound legal and moral 
(noncommodifying) right of action. Also, the institutional continuity of 
corporate defendants may provide evidentiary benefits for the plaintiffs as well 
as deny defendants the use of the good faith purchaser defense. Finally, the 
emergence of new evidence previously unknown because of undeveloped 
technology could provide an equitable basis for tolling the statute of limitations 
for such claims.

These doctrinal and technical arguments rest upon an important normative 
argument—to wit: if the extant law does not permit redress for the horrors of 
slavery and Jim Crow, then our law represents the “present embodiment” of a 
corrupt legal system, a legal system that legitimized slavery and Jim Crow. 
Law does not exist in a vacuum: “It is now . . . commonplace to say that the 
[United States’] legal system is an instrument as well as a product of social 
change.”101 Thus, if the redress claims of slave descendants are morally 
compelling, then they must be cognizable under our laws. Otherwise, 
American law stands as a “sequel” to as well as the “present embodiment” of 
America’s worst atrocity.102 From this perspective, slave-redress litigation 
presents nothing less than a credibility check on our current legal system just as 
the Supreme Court’s decision in Brown v. Board of Education103 represented a 
credibility check on the legal system in 1954.

III.
THE TORT MODEL’S NORMATIVE DEFICIENCIES

Although creative courts may sustain slave-redress cases, particularly 
private actions, I do not believe litigation offers a good strategy for slave 
redress in the future. The very essence of litigation is antithetical to the major 
social objective of slave redress—racial reconciliation. Adjudication in the 
American legal system is adversarial. Discord and contention are built into the 
process. For example, lawyers, whose main objective is to win, are given the 
primary responsibility for making the process work. Also, judges, who 
ostensibly represent the public’s interest, are in the main given passive 
powers—powers to react rather than to initiate.104 Too often the adversary 
process does not function well, and too often the problem lies with lawyers. 
Sometimes lawyers obfuscate the truth, exaggerate the contentiousness of

102. See Dagan, supra note 77, at 43.
104. EDMUND M. MORGAN, SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN 
SYSTEM OF LITIGATION 1 (1956) (“The theory of our adversary system is that each litigant is most 
interested and will be most effective in seeking, discovering, and presenting the materials which 
will reveal the strength of his own case and the weakness of his adversary’s case so that the truth 
will emerge to the impartial tribunal that makes the decision.”).
litigation (treating it as a "war"), and, whether out of greed, laziness, or sheer incompetency, sacrifice the interests of their clients to their own interests. I cite Pigford as Exhibit A.\textsuperscript{105}

More importantly, the tort model, whether in the form of litigation of legislation,\textsuperscript{106} cannot bring forth the \textit{sine qua non} of the perpetrator's duty in the slave-redress process, a genuine apology for slavery and Jim Crow. Such an apology is impossible in private actions because these cases are not brought against the chief perpetrator, the federal government. An apology in public actions would likewise be tainted because it would not be uncoerced. Rather, an apology would come as the perpetrator peered down the barrel of the proverbial litigation gun. Whether achieved through judicial fiat or by settlement, such an apology would not be genuine. Indeed, the typical settlement agreement in civil litigation contains an exculpatory clause wherein the defendant expressly denies liability. \textit{Accepting personal responsibility lies at the heart of a genuine apology.}

Furthermore, the tort model's major social objectives undermine racial harmony and reconciliation. The tort model's primary objective is to compensate victims. Plaintiffs are satisfied if the perpetrator simply comes forward with a check. The tort model's secondary objective (or its primary objective to some African Americans) is "to punish white Americans for their ancestors' brutal enslavement of African Americans."\textsuperscript{107} An apology, let alone racial reconciliation, is rarely even ranked in importance.\textsuperscript{108} But, without the

\textsuperscript{105} Pigford v. Glickman, 185 F.R.D. 82 (1999). In 1997, African-American farmers filed a class action lawsuit in federal court against Dan Glickman (President Clinton's Secretary of Agriculture at the time) alleging that the United States Department of Agriculture (USDA) systematically discriminated against African-American farmers in its financial assistance programs for farmers (including awarding farm loans) and failed to process claims of racial discrimination filed by these farmers. After negotiating an apparently reasonable settlement on behalf of their clients, the lawyers managed to snatch victory away from many class members. The lawyers persistently failed to meet filing deadlines for obtaining payments and filed fewer than "a small fraction of the total petitions requested by the farmers." Pigford v. Veneman, 292 F.3d 918, 921 (D.C. Cir. 2002). The court of appeals summarized the sordid details (prompting one trial judge to describe the lawyers' conduct as "bordering on legal malpractice"). \textit{See id.} at 921-22. Opinions for this case are reported at 182 F.R.D. 341 (D.D.C. 1998) (class certification granted) and 185 F.R.D. 82 (D.D.C. 1999) (consent decree approved and entered). Reported under the title \textit{Pigford v. Veneman}, other cases deal with post-consent decree issues, primarily the misconduct of class counsel, "bordering on legal malpractice," in failing to meet critical consent decree deadlines. 143 F. Supp. 2d 28 (D.D.C. 2001) (imposing fines on class counsel); 148 F. Supp. 2d 31 (D.D.C. 2001) (questioning class counsel's fidelity to their clients); 182 F. Supp. 2d 50 (D.D.C. 2002) (granting pro bono counsel's "motion to endow," giving arbitrary discretion to extend deadlines established under original consent decree "so long as justice requires"); rev'd and remanded 292 F.3d 918 (D.C.C. 2002). Though \textit{Pigford} illustrates the dangers of class-action litigation, which are applicable to slave-redress litigation, it is not a true slave-redress case because it focuses on present discrimination rather than past discrimination. \textit{Id.}

\textsuperscript{106} For a legislative example of the tort model, see \textit{supra} text accompanying note 8.


\textsuperscript{108} \textit{Id.}
demand for a genuine apology as a condition precedent to receiving money or any other form of redress—and without the expressed intent to promote racial reconciliation—the tort model undercuts the moral basis for slave redress and, in so doing, dishonors the memory of the slaves. Divorced from its moral underpinnings, any form of redress, especially the payment of money, looks, smells, and tastes like a racial shakedown, even though that is not the intent.

In the context of litigation, the tort model can also result in an insufficient development of the historical record. Development of the historical record is crucial to any attempt to redress a past atrocity. With so many lawsuits pending (and many more impending) one judge may see the facts of slavery, including its effects on contemporary society, differently from another judge. As often happens in complex litigation, we may end up with several different versions of the same set of facts.\textsuperscript{109} Perhaps the larger concern is that there may not be any development of the historical record. Some judges may feel institutionally constrained to develop the record of an event that took place so long ago.\textsuperscript{110} If the case is tried before a jury, there will be no formal findings of fact except a verdict for or against the parties. Worse, the parties may simply agree to settle quickly without paying any attention to the historical record, with the usual settlement refrain that the defendant does not admit to a violation of any law.

The final problem I have with the tort model returns us to its moral deficiency. The tort model’s feverish pursuit of compensation or punishment clouds the identity of slave redress and the international human rights movement. Although successful litigation can vindicate important human rights objectives,\textsuperscript{111} legislative strategies, wherein the victim seeks not merely compensation (and never punishment) but atonement, are the most effective for redressing past atrocities.\textsuperscript{112} Indeed, victims’ groups within the international redress movement have often refused to accept money from the perpetrator unless it was “atonement money.”\textsuperscript{113} When pursued under the tort model,

\textsuperscript{109} Notwithstanding the doctrine of res judicata, which is supposed to prevent inconsistent judicial determinations of the same set of facts, inconsistency does occur. \textit{See}, e.g., State Farm Fire and Cas. Co. v. Century Home Components, 550 P. 2d 1185 (Or. 1976).

\textsuperscript{110} For example, in one of the Japanese-American \textit{coram nobis} cases—cases in which the criminal record involving a prior conviction is corrected—the trial judge refused to issue a judicial opinion regarding the true facts surrounding the petitioner’s World War II conviction under the internment laws. Judge Belloni simply vacated petitioner Yasui’s criminal conviction forty years after the fact without commenting on the issue of prosecutorial misconduct. \textit{See} Yasui v. United States, No. 83-151 (D. Or. Jan. 26, 1984). \textit{See also}, ERIC K. YAMAMOTO ET AL., \textit{RACE, RIGHTS AND REPARATIONS: LAW AND THE JAPANESE AMERICAN INTERNMENT} 318 (2001).

\textsuperscript{111} \textit{See supra} note 4.

\textsuperscript{112} \textit{See generally} BROOKS, \textit{WHEN SORRY ISN’T ENOUGH}, \textit{supra} note 1, at Part 2 (Germany), Part 3 (Japan), Part 4 (Japanese Americans), Part 8 (South Africa).

\textsuperscript{113} The “comfort women,” for example, refused to accept compensation from the Japanese Diet without a prefatory apology. \textit{See} George Hicks, \textit{The Comfort Women Redress Movement, in WHEN SORRY ISN’T ENOUGH}, \textit{supra} note 1, at 123-24.
whether in litigation or legislation, slave redress loses credibility and support that can come from an alignment with the ongoing struggles of human rights movements worldwide such as the *jugun ianfu* ("comfort women") against the Japanese Diet for their sexual enslavement during World War II, the historic crusade of South-African Blacks against the legacy of Apartheid, and other struggles worldwide.¹¹⁴

IV.

**atonement model: an overview¹¹⁵**

Rather than pursuing slave redress under the tort model, African Americans should proceed in a way that identifies with the best of the international redress movement—that is, pursue a redress strategy of atonement. It is an approach most elegantly framed by Konrad Adenauer, the first Chancellor of the Federal Republic of Germany.¹¹⁶ Explaining the reasons post-war Germany had embarked upon its largely voluntary and certainly unprecedented redress program for Jewish victims of Nazi persecution, Chancellor Adenauer stated: "In our name, unspeakable crimes have been committed and demand compensation and restitution, both moral and material, for the persons and properties of the Jews who have been so seriously harmed."¹¹⁷

The atonement model is crafted from this post-Holocaust spirit of heightened morality, identity between victim and perpetrator, egalitarianism, and restorative justice. The model is less victim-focused than perpetrator-focused. It is, first and foremost, about a government taking moral responsibility for its past atrocities and, in the process, laying the foundation for repairing a broken relationship between it and the victims of such atrocities. In the context of slavery and Jim Crow, atonement is about the federal government’s remorse for its participation in the institutions of slavery and Jim Crow, and the potential for racial reconciliation that flows from that atonement.¹¹⁸ Thus, the atonement model offers a legislative approach to slave redress, albeit a particular type of legislative action.

Atonement has two components—apology and reparations. Apology in response to a past atrocity "is more complex than 'contrition chic,' or the

¹¹⁴. See generally BROOKS, WHEN SORRY ISN’T ENOUGH, supra note 1.
¹¹⁵. For a more detailed discussion, see BROOKS, ATONEMENT AND FORGIVENESS, supra note 7.
¹¹⁷. United States Department of Justice Foreign Claims Settlement Commission, German Compensation for National Socialist Crimes, in WHEN SORRY ISN’T ENOUGH, supra note 1, at 61.
¹¹⁸. There is nothing in the atonement model that precludes its application to the states, especially the southern states.
canonization of sentimentality.” 119 It is a matrix of intensity and statesmanship that “improves the national spirit and health.” 120 When the perpetrator of an atrocity apologizes, it must (1) confess the deed, (2) admit that the deed constitutes an atrocity, (3) repent, and (4) ask for forgiveness. All four conditions of remorse are essential to taking personal responsibility. 121

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 his apology with a redemptive act so as to make the apology believable—that is, more than just words. That redemptive act is, properly speaking, a “reparation.” A reparation can be the tangible act that transforms the rhetoric of apology into a meaningful and material reality. Accordingly, a reparation can be defined as “the revelation and realization of an apology.” 122

Defined as apology plus reparations, atonement 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; it understands the pain it has caused and continues to cause the victims.

Implicit in the atonement model’s process of apology is the condition that the perpetrator set the historical record straight so that everyone fully understands why the apology is being made. In providing the factual foundation for the tender of the apology, clarification of the historical record results in a collective judgment regarding the extent of the perpetrator’s responsibility in creating the atrocity and the magnitude of the injustice, including its lingering effects. Setting the historical record straight can, to borrow from Elazar Barkan, “fuse polarized antagonistic histories into a core of shared history to which both sides can subscribe.” 123 It helps a nation, especially a heterogeneous one, to create what Jurgen Habermas calls “discourse ethics,” a set of norms on which people with different interests can agree. 124 As one method of enacting this process, Donald Shriver describes “a series of meetings between Polish and German teachers and historians for the purpose of revising school textbooks of the two countries so that the story of

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119. ROY L. BROOKS, The Age of Apology, in WHEN SORRY ISN’T ENOUGH, supra note 1, at 3.
120. Id.
122. Id. at 10.
their twentieth-century relation[s] would be interpreted to each other’s young people in mutually acceptable accounts.\textsuperscript{125}

Clarification is desperately needed regarding the historical record on American slavery. The telling of this story has been the mother’s milk of white misunderstanding about the peculiar institution and white complacency about its lingering effects. When Whites reject reparations, arguing that they had nothing to do with slavery, they fail to understand the centrality of slavery in the socioeconomic development of this great country from which they benefit. When Whites reject reparations, arguing that there are plenty of successful African Americans today (including the oft-cited Oprah Winfrey, Tiger Woods, Michael Jordan, and Colin Powell), they fail to see the millions of African Americans who have not been able to overcome the lethal legacy of slavery. When our government refuses to apologize for slavery, it reinforces white ignorance and complacency about slavery. When our government does not apologize, it makes it clear that it fails 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.’”\textsuperscript{126}

Apology and reparations place the matter of forgiveness on the table. Though never a consideration under the tort model, forgiveness is an essential component of the atonement model’s ultimate goal of reconciliation, meaning racial reconciliation in the context of slave redress. Once the perpetrator atones, the matter of forgiveness arrives on the victim’s desk as a kind of civic subpoena. If the government’s apology is complete and its reparations substantial, African Americans will have, in my view, a civic responsibility to forgive and thereby begin the process of repairing a broken relationship with the federal government. Forgiveness thus makes national healing and reconciliation possible in the aftermath of two of America’s greatest atrocities—slavery and Jim Crow.\textsuperscript{127}

V.

CONCLUSION

While I believe litigation can be a useful tool in the fight for racial justice, and while I have enormous respect for the committed and talented lawyers who bring slave-redress lawsuits, I do not favor the tort model as the primary future

\textsuperscript{125} DONALD W. SHRIVER, JR., AN ETHIC FOR ENEMIES: FORGIVENESS IN POLITICS 19 (1995).

\textsuperscript{126} DAVID BRION DAVIS, IN THE IMAGE OF GOD: RELIGION, MORAL VALUES, AND OUR HERITAGE OF SLAVERY 168-69 (2001) (emphasis added). David Brion Davis is perhaps our leading historian on the institution of slavery.

\textsuperscript{127} On the question of forgiveness, see BROOKS, ATONEMENT AND FORGIVENESS, supra note 7.
strategy for obtaining redress for slavery and Jim Crow. The tort model, like all litigation, is too confrontational to provide the kind of racial reconciliation and accord needed for future race relations. Litigation exaggerates the contentiousness of slave redress. It is also too susceptible to lawyer abuse, which can, in turn, prevent the plaintiffs from receiving genuine relief.

Most importantly, the tort model, whether in the form of litigation or legislation, is incapable of generating the one ingredient that is or should be the sine qua non of the perpetrator's role in slave redress—atonement. A deep, sincere apology solidified by reparations will give slaves' lives posthumous meaning. The issue is one of human dignity, not only for today's African Americans but also for the slaves. African Americans must insist upon atonement so that the slaves shall not have lived and died in vain.128