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Reparations for Slavery: A Structure for Discussion and Consideration of U.S. Litigation Alternatives

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REPARATIONS FOR SLAVERY: A STRUCTURE FOR DISCUSSION AND CONSIDERATION OF U.S. LITIGATION ALTERNATIVES

David I. Levine*

This discussion paper begins with commentary on the ideas of Posner and Vermeule. These authors focus on possible theories justifying reparations. They then examine limitations that the US Constitution might impose on any reparations plan. Finally, Posner and Vermeule consider some design alternatives regarding reparations schemes. The discussion paper then analyzes various issues with regard to courts in the United States recognizing claims for reparations. The paper suggests that claims for reparations, if properly structured, may have a measure of success in state courts.

Au début de cet article de discussion, les idées de Posner et de Vermeule sont commentées. Ces auteurs concentrent leur attention sur des théories possibles pour justifier des réparations. Ensuite, ils examinent les limites que peut imposer la constitution américaine à tout plan de réparations. En dernier lieu, Posner et Vermeule considèrent diverses façons de concevoir des plans de réparations. L'article de discussion analyse ensuite diverses questions relatives à l'accueil de demandes de réparations par les cours américaines. L'article suggère que des demandes de réparations pourraient jouir d'une certaine mesure de succès dans les cours des états si elles sont bien structurées.

I. INTRODUCTION

There has been much discussion of the moral and policy arguments concerning reparations for slavery in the United States.[1] However, as Professors Eric Posner and Adrian Vermeule have noted in a recent essay, the arguments for and against the concept are not often joined. They charge that "proponents of reparations focus monomaniacally on the historical injustices inflicted upon victim groups, while minimizing the serious problems of policy design that reparations

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1 See, e.g., Symposium, "Healing the Wounds of Slavery: Can Present Legal Remedies Cure Past Wrongs?," 24 B.C. Third World L.J. 1 (2004); Symposium, "A Dream Deferred: Comparative and Practical Considerations for the Black Reparations Movement," 58 N.Y.U.Ann.Surv.Am.L. 447 et seq. (2003); Chad W. Bryan, "Precedent for Reparations? A Look at Historical Movements for Redress and Where Awarding Reparations for Slavery Might Fit," 54 Ala. L. Rev. 599 (2003). For discussion of a related policy question in the context of criminal law, see Daniel W. Shuman & Alexander McCall Smith, *Justice and the Prosecution of Old Crimes* (Washington, D.C., American Psychological Association, 2000).

pose," at the same time as "[o]pponents ... minimize the relevant injustices and portray reparations proposals as outlandish or even unprecedented, overlooking that federal and state governments have often paid reparations in one form or another."[2]

Posner and Vermeule's essay provides an excellent structure from which to consider any type of reparations scheme. In the first part of this paper, I will try to capture the essence of their arguments. In the second part of the paper, I will raise an entirely different matter. After reviewing some of the reparations suits, which have been filed in U.S. federal courts, I will suggest that the proponents of a litigation strategy for reparations claims are perhaps overlooking a fruitful location for lawsuits – the U.S. state courts. If the lawsuits are structured properly in light of Posner and Vermeule's suggestions, some of the problems that could be encountered in federal courts in the United States may prove to be somewhat more surmountable.

II. POSNER AND VERMEULE

Reparations fit in conceptually somewhere between ordinary judicial remedies and legislatively-mandated transfer programs. Remedies awarded by courts, especially as conceived in federal courts in the United States, typically are limited to directing an identified wrongdoer to pay money or to provide benefits to an identified victim.[3] Judicially-imposed reparations for slavery are controversial in large measure because the proponents contend that both requirements be relaxed, requiring "living taxpayers to pay money to living African Americans based on harms inflicted by dead people (antebellum whites) on dead people (antebellum blacks)."[4] Reparations are also controversial to the extent they seek a remedy for conduct which was legal at the time the acts were committed, particularly where the application of one or more standard legal doctrines (such as the defenses of standing, sovereign immunity or the statute of limitations[5])

2 Eric A. Posner & Adrian Vermeule, "Reparations for Slavery and Other Historical Injustices," 103 Colum. L.Rev. 689 (2003). The authors provide a chart giving examples of reparations paid in the U.S. and in a number of other countries, including Germany, Canada, Chile and Japan. *Ibid.* at 696–97.

3 *Ibid.* at 691. One prime example is *Rizzo v. Goode*, 423 U.S. 362 (1976), where the U.S. Supreme Court rejected a remedy imposed by a federal trial court upon the police department in Philadelphia, Pennsylvania, for police misconduct because the court majority thought there was an insufficient nexus linking: (1) the harm proven to have been done to a relatively small number of victims by certain uniformed police officers; (2) the plaintiffs who brought the case, who were largely citizens of the city rather than the direct victims of brutality; and (3) the defendants, principally the Mayor, the City Managing Director and the Police Commissioner. For further discussion of the background of the case, see Phillip J. Cooper, *Hard Judicial Choices* 297–327 (New York, Oxford University Press, 1988).

4 *Supra note* 2. at 692.

5 These defenses have been addressed recently in Adjoa A. Aiyetoro, "Formulating Reparations Litigation Through the Eyes of the Movement," 58 N.Y.U.Ann.Surv.Am.L. 457, 466–72 (2003) and Alfred L. Brophy, "Some Conceptual and Legal Problems in Reparations for Slavery," 58 N.Y.U.Ann. Surv. Am. L. 497 (2003).

would ordinarily bar a judicially-imposed remedy.[6] Thus, "[t]hey share the backward-looking, corrective justice focus of many ordinary remedies, but share with transfer programs a willingness to do mass or aggregate justice by dispensing with individualized moral justification for the transfer."[7] According to Posner and Vermeule, this combination makes reparations plans "morally intriguing" and perhaps even "morally incoherent."[8]

The authors seek to clarify the moral questions by examining various possible ethical theories of reparations. In linking original victims and original wrongdoers to potential beneficiaries and potential payers of reparations, Posner and Vermeule observe that reparations plans are based on a moral obligation arising either from a theory of compensation for harm done by one group to another group, or from a theory of unjust enrichment.[9] They note that the question of who is responsible for the moral obligation can be considered under three possible positions. The first, ethical individualism, posits that only individuals have moral obligations and rights. A variation, which they call "soft' ethical individualism," suggests that certain entities (such as corporations or legally recognized Indian tribes[10]) can have moral obligations and rights even where the individual members or owners of the body do not. In the third version, ethical collectivism, even a more loosely defined group such as a nation or a race can have moral obligations or rights.[11] Posner and Vermeule then develop these two grounds of moral obligation and three ways of considering who is responsible for the obligation into six theories of reparations.[12]

For example, under a theory combining compensation and ethical individualism, an individual can be a beneficiary only if she can prove that she was a victim of cognizable harm as a result of wrongdoing committed by an individual. At the opposite end of the spectrum, under a theory combining restitution and ethical collectivism, members of a group (such as whites currently living in the United States) would pay reparations to members of another group (such as African Americans currently living in the U.S.) for the unjust enrichment taken by other whites many generations ago.

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6 Supra note 4 at 691. The authors distinguish this type of corrective remediation for past wrongs from a governmental transfer program (such as payments to the poor or aged), which is justified on the basis of "forward-looking reasons" such as distributive justice or utility maximization. *Ibid.* at 692.

7 *Ibid.* at 693.

8 *Ibid.*

9 *Ibid.* at 698.

10 E.g., *Cayuga Indian Nation of New York v. Pataki*, 165 F.Supp.2d 266 (N.D.N.Y. 2001) (awarding nearly U.S.$250,000,000 to Indian tribe for loss of lands taken by State of New York in 1795). See also Arlinda Locklear, "Morality and Justice 200 Years After the Fact", 37 New Eng. L. Rev. 593 (2003) (listing other Indian land claims pending in U.S. federal courts).

11 *Ibid.* at 698–99. Posner and Vermeule also discuss, *ibid.* at 709–711, a variation of ethical collectivism as the moral taint theory: where people feel a taint as a result of some association with wrongful behavior even though it was entirely out of their control and for which they are morally blameless. Some examples might be young Germans who feel some taint from the Holocaust or U.S. citizens who were not born until well after Japanese Americans were interned during World War II.

12 *Ibid.* at 699.

After presenting these theories, the authors turn to limitations that the U.S. Constitution might impose on any reparations plan. They note that a reparations plan might be challenged by objecting payers (such as taxpayers, or applicants from non-preferred races in the case of reparations in the form of racial preferences in employment, education or housing).[13] The plan might also be challenged by would-be beneficiaries who have been excluded from the plan, but who are alleged to be similarly situated to the benefited group.[14] For example, Asian Americans might object to an affirmative action plan that benefits only certain races, but not them.[15] Finally, the authors consider challenges from beneficiaries who might object to a reparations plan because the offer of reparations might itself be demeaning.[16] Posner and Vermeule assess the sort of plans which they see as being able to pass scrutiny (e.g., the use of general revenue of the United States government for the purpose of paying reparations to Japanese Americans interned during World War II[17]) from those which would be more problematic (such as a tax to be paid only by non-African Americans to fund reparation payments to African Americans).[18] In their assessment, they contend that a federal statute providing cash payments from the general revenue of the United States government to every African American as reparations for the continuing effects of slavery might be held to be constitutional.[19]

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13 *Ibid.* at 711–21.

14 *Ibid.* at 721–23. The authors point to *Jacobs v. Barr*, 959 F.2d 313 (D.C.Cir.), cert. denied, 506 U.S. 831 (1992), where a German American who had been interned by the U.S. during World War II unsuccessfully challenged the federal statute limiting the payment of reparations to interned Japanese Americans.

15 *Ibid.* at 722 (imagining that Chinese Americans might complain about their exclusion from a hypothetical U.S. statute providing reparations only to African Americans for slavery, because of their ancestors' experience as coolie labor in the 19th century, but assuming that such a challenge would fail). But see David I. Levine, "The Chinese-American Challenge to Court-Mandated Quotas in San Francisco's Public Schools: Notes From a (Partisan) Participant-Observer," 16 Harv. BlackLetter L.Rev. 39, 135 (2000) (suit brought by author on behalf of Chinese American students successfully alleging race discrimination in a court-mandated system of student assignment, "provided the advantage of promoting the interests of a class of people who unquestionably had suffered *de jure* segregation in California and whose constitutional rights were being harmed without any proof that the harm was being inflicted to correct a legally cognizable injury to others").

16 103 Colum.L.Rev. at 723–25. The author's note that Supreme Court Justice Clarence Thomas has objected to affirmative action plans on this basis. Ibid. at 724 n.87 (citing *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 240–41 (1995) (Thomas, J., concurring)). Subsequent to Posner and Vermeule's writing, Justice Thomas has reiterated his objections. *Grutter v. Bollinger*, 123 S.Ct. 2325, 2362 (2003) (Thomas, J., concurring and dissenting). Nevertheless, in their essay, the authors stated their belief that this sort of challenge would be more theoretical than real. Even more theoretical is the probably non-existent case of a would-be payer who objects to being excluded from the group who must pay reparations. 103 Colum.L.Rev. at 712.

17 *Ibid.* at 714.

18 *Ibid.* at 720.

19 *Ibid.* at 715–21. Posner and Vermeule do not assess the political viability of such a federal statute. This author believes that the chances are nil under President Bush and the Republican-controlled Congress. Whether that prediction would change must await the results of the 2004 elections in the U.S. Posner and Vermeule also recognize that their cautious assessment might be affected by then still-pending affirmative action cases concerning admissions policies at the University of Michigan. Subsequent to their writing, the U.S. Supreme Court affirmed that certain race-based programs might be constitutional, if they are narrowly tailored: *Grutter v. Bollinger*, 123 S.Ct. 2325 (2003); *Gratz v. Bollinger*, 123 S.Ct. 2411 (2003).

Finally, Posner and Vermeule consider issues regarding what they call design alternatives. For present purposes, their discussion of temporal issues is most germane.[20] For example, one must consider whether the reparations are for a discrete or continuing harm.[21] This has an impact on whether or not claims might be considered time-barred or whether true victims or proxies are receiving the reparations. One must decide whether the reparations are to come in the form of a lump sum or a stream of continuing payments.[22] Posner and Vermeule point out that this is not simply a matter of whether the sums are too large to be paid at once, but whether future generations are required to directly shoulder a portion of the burden of paying the reparations.[23] One must also decide if the reparations are to be considered final payment for the wrong inflicted.[24] If so, future generations of the class of beneficiaries could argue that the arrangement is unfair because they were not represented in its making, especially if the original wrong is deemed to continue to inflict harm through the generations.[25] In addition, other groups may argue that their grievances need to be redressed.[26]

Posner and Vermeule end their essay at this point. Their purpose was not to directly address specific reparations plans, but rather to help create a structure so that the matter can be debated at a lower temperature and at a lower level of abstraction.[27]

III. REPARATIONS CLAIMS IN COURTS

When one examines the fate of reparations claims, which have been filed in courts, one can begin to see the difficulties in the view of U.S. judges. The paradigm example is *Cato v. United States*.[28] In *Cato*, the plaintiffs sought monetary damages against the United States for damages due to the enslavement of African Americans and subsequent discrimination against them, for an

20 They also consider whether the form of reparation should be cash, an in-kind payment (such as affirmative action or the grant of land or special voting rights), or an apology. *Supra* note 2. at 725–41.

21 *Ibid.* at 741–42. Thus, the vestiges of slavery, if legally shown to be continuing to this day, might be considered compensable under this view.

22 The authors compare the lump sum payments to victims of a government-sponsored syphilis experiment to the periodic payments paid to Israel by Germany for the Holocaust. Ibid. at 742.

23 *Ibid.* at 743–44.

24 *Ibid.* at 744–46. Thus, some argue that if reparations are ever paid, all race-based affirmative action should be terminated. *Ibid.* at 744.

25 See, e.g., *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997) (invalidating a settlement purporting to bind all people in the United States who had been exposed on the job to one of 20 defendants' asbestos products but who had not yet filed suit for injuries, then known or unknown).

26 *Ibid.* at 745–46. Posner and Vermeule point out that paying reparations to numerous other groups has the effect of lessening the recognition of the special quality of the harm suffered when just one or a very few groups' claims are recognized. From the payers' point of view, the authors note that the cost of every reparations program approved must include some recognition that it is that much more likely that another similarly situated group will receive reparations in the future, too. *Ibid.* at 746.

27 *Ibid.* at 746–47.

28 70 F.3d 1103 (9th Cir. 1995).

acknowledgment of the injustice of slavery from 1619–1865 and for the subsequent discrimination against freed slaves and their descendants, and for an apology from the United States.[29] The suit was dismissed by the trial court judge because the plaintiff could not demonstrate that the United States had consented to such a suit and because the proper forum for resolution of this sort of policy question was Congress rather than the courts.[30] A three-judge panel of the Ninth Circuit, generally conceded to be the most liberal federal appellate court in the U.S., affirmed.[31]

The circuit panel noted that the United States had not waived its sovereign immunity through the *Federal Torts Claims Act*.[32] The FTCA applies only to suits for claims accruing on or after January 1, 1945; such suits must be brought within two years after accrual.[33] Thus claims arising from slavery, or most of its aftermath, fell outside the FTCA's limited waiver of sovereign immunity.[34] The court rejected any analogy to the Indian land cases or the relationship between Indian tribes and the U.S. as reasons to relieve private plaintiffs of their obligation to meet all conditions for bringing suit against the U.S.

The court also rejected the argument that the statute of limitations could be avoided on the grounds that the badges and indicia of slavery present today constituted a continuing wrong. Although the court recognized the doctrine of continuing wrong, *Cato* was unable to tie the idea to any cognizable claim against the United States government. The court held that, at least as the complaint was pleaded, *Cato* lacked standing to make a generalized challenge to the alleged failure of Congress to exercise the power it was granted in the Thirteenth Amendment to the U.S. Constitution to pass laws designed to abolish the badges and incidents of slavery.[35] Furthermore, the legislators who allegedly had failed in executing the duty posited would enjoy absolute immunity under the U.S. Constitution.[36] Finally, the U.S. had not rendered itself liable to suit for damages under the FTCA for any alleged violation of the Thirteenth Amendment.[37]

The court did recognize that the United States had waived sovereign immunity in suits requesting non-monetary relief. However, *Cato*'s demand for an acknowledgment of discrimination and an apology failed because of the lack of

29 *Ibid.* at 1105.

30 *Ibid.* Coincidentally, the district court judge dismissing the claim happens to be an African American woman.

31 The panel consisted of three women, Judges Pamela Rymer, Mary Schroder and Betty Fletcher. Judge Rymer, the most conservative of the three judges, wrote the unanimous opinion. It is telling that Judge Fletcher, one of the very most liberal judges on this large court, did not write a separate opinion, indicating that she saw some sort of judicial pathway to a successful reparations claim. Thus, this case seems to be the proverbial "canary in the coal mine" of reparations cases, indicating that a broad claim is unlikely to succeed in any federal court in the U.S.

32 28 U.S.C. § 1346.

33 28 U.S.C. § 2401(b).

34 The court noted that the general six-year statute of limitations for claims against the U.S., 28 U.S.C. § 2401(a), might have been an alternate reason to reject claims based on historical events occurring prior to the Civil War. 70 F.3d at 1108 n. 6.

35 *Ibid.* at 1109.

36 *Ibid.* at 1110.

37 *Ibid.* at 1110–11.

standing to seek relief premised on the stigmatizing injury resulting from discrimination.[38] Thus, the circuit panel agreed with the trial court that all of Cato's claims were properly dismissed with prejudice. The proper forum for relief would be in Congress rather than in the federal judiciary.[39]

The result in *Cato* is indicative of what would likely happen to any similar claim in a federal court in the U.S. For example, a similar claim for reparations was summarily dismissed recently by a federal trial court in the District of Connecticut because the plaintiff could not demonstrate that the U.S. had waived its sovereign immunity.[40]

The court in Connecticut distinguished another failed suit for reparations, *Obadele v. United States*.[41] *Obadele* is a suit predicted by Posner and Vermeule's structure. It is a claim for reparations brought by would-be beneficiaries who have been excluded from a particular reparations plan, in this case the *Civil Liberties Act of 1988*,[42] which is the statute affording reparations to Japanese-Americans for internment during World War II. The African-American plaintiffs made no attempt to demonstrate their eligibility under the Act as written. Instead, they "base[d] their claims upon the enslavement of their ancestors and the continuing failure of the United States to recognize African-Americans' right to self-determination following the abolition of slavery."[43] The claims were rejected at the administrative level because the claimants claimed "Afrikan" ancestry rather than Japanese ancestry, as required under the statute. None of their claims of deprivation derived from federal government action "respecting the evacuation, relocation, and internment" of Japanese-Americans.[44]

The Court of Federal Claims affirmed the administrative decision. The court explained that the decision of Congress to compensate the Japanese for their treatment was constitutional in that it met the strict requirements for a race-based remedy.[45] Although stating that the court was sympathetic to the moral claim regarding slavery, in its view, the right forum for turning that claim into a remedy was in the legislature rather than in the courts. Thus, "the Plaintiffs are really only saying that the victims and heirs of one historical wrong have succeeded in per-

38 Cato's claim was treated on an individual basis, but even if it had been properly pled as a class action, it is doubtful that Cato or any other African American would be deemed to have the requisite standing. See, e.g., *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) (plaintiff who alleged he had been choked by police officer following unconstitutional city policy lacked standing to seek an injunction stopping such practice in the future).

39 *Ibid.* at 1111.

40 *Abdullah v. United States*, 2003 WL 1741922 (D.Conn. 2003). Accord, *Bell v. United States*, 2001 U.S. Dist. LEXIS 14812 (N.D. Tex. July 9, 2001).

41 52 Fed.Cl. 432 (2002), aff'd, 61 Fed.Appx. 705 (Fed. Cir. 2003).

42 50 U.S.C. app. § 1989.

43 52 Fed. Cl. at 434.

44 *Ibid.* at 435.

45 *Ibid.* at 442. It agreed with the analysis in *Jacobs v. Barr*, 959 F.2d 313 (D.C.Cir.), cert. denied, 506 U.S. 831 (1992) (World War II internee of German ancestry unsuccessfully challenged the program on equal protection grounds). Accord, *Shibayama v. United States*, 55 Fed.Cl. 720 (2002) (Peruvian citizens of Japanese ancestry who were taken from Peru and held in the United States during World War II unsuccessfully challenged program's requirements that claimants be U.S. citizens or permanent residents).

suading the public and Congress of their entitlement to redress, whereas Dr. Obadele and like-minded advocates are in the process of trying to achieve that same result for another historical wrong."[46] Once the court determined that the statute that Congress had passed was constitutional, there was nothing that the court could do to assist the plaintiffs in their effort to obtain like treatment.

These types of decisions have been criticized for "looking at the claims through the eyes of the traditional legal system, and not through the eyes of the plaintiffs."[47] While true, it seems unlikely that a court[48] will ever do anything else. Other commentators who are sympathetic to the reparations movement recognize the difficulties that the legal doctrines impose, and have suggested other ways to achieve similar results by avoiding the procedural pitfalls.

For example, Al Brophy has explored other potential legal theories with some care. He notes the possibility of a suit against colleges (or perhaps other charitable institutions) that received donated money acquired as a result of slavery.[49] He believes that it might be possible to narrow the suit to plaintiffs who descended from the slaves working on a particular plantation owned by a donor to the institution.[50] While recognizing that a suit against the donor's estate would be long foreclosed, he argues in some plausible ways that a suit against the beneficiary through a theory of tracing the proceeds of unjust enrichment might remain viable to this day.[51] He is appropriately more skeptical of the suits filed on behalf of the descendants of slaves against corporations that were in existence during slavery and allegedly profited from slavery.[52] With his excellent

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46 *Ibid.* at 443.

47 Aiyetoro, supra note 5, 58 N.Y.U.Ann.Surv.Am.L. at 465, citing Mari Matsuda, "Looking to the Bottom: Critical Legal Studies and Reparations", 22 Harv. C.R.-C.L. L. Rev. 323 (1987). See also Roy L. Brooks, "Rehabilitative Reparations for the Judicial Process", 58 N.Y.U. Ann. Surv. Am. L. 475 at 477 (2003) (seeking "the internalization of black values or perspectives in judicial reasoning").

48 Actually, at least two courts, since if a trial court were ever to rule favorably on the merits of a reparations claim of the sort proposed in *Cato* or *Obadele,* that decision certainly would be appealed at the earliest opportunity.

49 Brophy, *supra* note 5, 58 N.Y.U.Ann.Surv.Am.L. at 514. Subsequent to the Windsor Conference, the president of Brown University, herself a descendent of slaves, has launched an investigation of that Ivy League institution's connections to slavery, including consideration of whether the university should pay reparations or make other amends. Jennifer D. Jordan, "Brown Begins 2-Year Scrutiny of Slavery and Reparations," Providence Journal-Bulletin at B02 (March 15, 2004) (2004 WL 59117603).

50 *Ibid.*

51 *Ibid.* at 514–15.

52 *Ibid.* at 515. The suits are against entities such as Aetna, Inc., Brown Brothers Harriman & Co., CSX Corp., FleetBoston Financial Corp. and the Norfolk Southern Railway Co. All have been centralized for pre-trial purposes in one federal court. *In re African-American Slave Descendants Litigation,* 231 F.Supp.2d 1357 (MDL 2002).

Aetna has issued apologies regarding its writing policies on the lives of slaves, but has not acceded to demands for reparations. See "Comment: Speculating a Strategy: Suing Insurance Companies to Obtain Legislative Reparations For Slavery," 9 Conn. Ins. L.J. 211, 220 n.62 (2002). Subsequent to the conference, the federal trial court dismissed the complaints. The court held that the plaintiffs lacked standing to bring suit, the actions presented a nonjusticiable political question, the actions failed to state a claim upon which relief could be granted; and the claims were barred by the applicable statutes of limitation. *In re African-American Slave Descendants Litigation,* 2004 WL 112646 (N.D.Ill. 2004).

historical research, Brophy has also helped lay the groundwork for a traditional suit for damages on behalf of the victims of the Tulsa Race Riot of 1921.[53]

Emma Coleman Jordan is another scholar who has tried to conceptualize a way to get around the defects that exist when trying to make slavery the core of a reparations suit.[54] Jordan suggests that the temporal problems, which make a suit based upon slavery nearly impossible to imagine succeeding, can be alleviated. She suggests looking at what she refers to as the "red record" of the pattern of lynchings and race riots in the much more recent past in the U.S.[55] She contends that by focusing on the relatively recent past (as Brophy suggests with his focus on a horrible event from 1921), it is easier to imagine a conventional lawsuit being constructed which would pass muster, or to find a more willing audience to consider a legislatively generated compensation plan.

Most scholars seem to agree that it will be extremely difficult – at best – for someone to prevail in a claim in federal court against the United States for its moral responsibility for slavery. The prospects for a federal statutory solution are theoretically more promising, but the current politics seem to suggest that it is not likely to actually bear fruit in the foreseeable future. Suits in federal court against private entities might prove more promising, as Brophy suggests. At the same time, there is comparatively little discussion of state law as the basis for claims that would serve the function of reparations suits. One possibility would be to look to the creation of a reparations plan by the passage of legislation (or a ballot initiative) in a particular state. The politics in some states might be amenable to the success of such legislation. For example, in 2000, the California Legislature passed a law entitled "Slavery Era Insurance Policies."[56] It adds language to the *California Insurance Code* requiring the insurance commissioner to request and obtain information from insurers doing business in the state regarding any records of slaveholder insurance policies. The information is to be made public; descendants of slaves whose ancestors' owners were compensated for damages by insurers are entitled to full disclosure. A report has been made, with the names of the identified slaves attached.[57] Companion legislation requested the University of California to sponsor a colloquium analyzing the economic benefits of slavery that accrued to owners and the businesses.[58]

One author noted in discussing this legislation, "[t]he passage of the California statutes makes bringing suit against insurance companies in California

53 Alfred L. Brophy, *Reconstructing the Dreamland: The Tulsa Riot of 1921* (New York, Oxford University Press, 2002). See also Alberto B. Lopez, "Focusing the Reparations Debate Beyond 1865," 69 Tenn.L.Rev. 653 (2002) (reviewing Brophy's book).

54 Emma Coleman Jordan, "A History Lesson: Reparations for What?," 58 N.Y.U. Ann. Surv. Am. L. 557 (2003) ("While slavery is the root of modern racism, it suffers many defects as the centerpiece of reparations litigation strategy.").

55 *Ibid.* at 559 (citing Ida B. Wells for the term).

56 Calif. Ins. Code §§ 13810–13.

57 California Department of Insurance Slavery Era Insurance Registry Report to the California Legislature (May 2002). The Report and additional information, such as the location of the policies that have been discovered and the names of slaves and slaveholders are available at <http://www.insurance.ca.gov>.

58 Cal. Ed. Code § 92615 (2001). The conference took place in 2002 at the University of California, Los Angeles.

courts easier, which in turn facilitates federal legislative attention and action."[59] However, the legislative history shows that it may be politically difficult to obtain a more robust remedy from any state legislature. The proposed legislation originally included some more controversial provisions that were later deleted in order the get the bill passed. For example, the bill once included a provision allowing legal standing to seek compensation or other remedies from the insurance companies. The provisions were deleted because of concerns about their constitutionality primarily because the policies were legal when issued prior to the Civil War.[60] Still, the information uncovered may help create a political impetus to finding a more ambitious legislative solution in the future. Legislators in a state with a large African American voting population (such as the states in the Old Confederacy) might find it politically expedient to consider enacting comparable legislation.[61]

Another possibility might be to frame a lawsuit under state law. The same author assesses the chances of bringing a claim in Connecticut state court for unjust enrichment against insurance companies who wrote slave policies.[62] The concept of unjust enrichment is fairly loose in Connecticut law, but has not been commonly applied to insurance contracts. It would be necessary to determine whether insurance companies were both benefited and unjustly so from the labors of slaves.[63] The preliminary assessment does not seem to rule out such a claim entirely.[64] The normal concerns about standing and the statute of limitations might still be problematic.[65]

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59 Comment, *supra* note 52, 9 Conn.Ins.L.J. at 246.

60 *Ibid.* One must also consider whether legislation which purported to allow the resurrection of otherwise time-barred claims would be constitutional. See *Stogner v. California*, 123 S.Ct. 2446 (2003) (holding that a state statute permitting the revival of otherwise time-barred prosecutions for sex related child abuse crimes violated the Ex Post Facto Clause of the U.S. Constitution, where the statute itself was enacted after pre-existing limitations periods had expired).

61 The U.S. Supreme Court's recent opinion on how far such insurance statutes may reach provides some additional guidance. The high Court held that California's *Holocaust Victim Insurance Relief Act* of 1999, Cal. Ins. Code § 13800–13807, could not require the disclosure of insurance claims-related information by an insurance company that is licensed to do business in California when the required information was in the hands of a related entity located in a foreign country. California's statute was preempted because it impermissibly interfered with the President's conduct of foreign affairs. *American Insurance Association v. Garamendi*, 123 S.Ct. 2374 (2003). Presumably, a statute limited to information regarding domestic insurance entities and policies written regarding slaves who had been located within the U.S. would not suffer from this particular infirmity.

62 Comment, *supra* note 52, 9 Conn.Ins.L.J. at 224 et seq.

63 See also Anthony J. Sebok, "Reparations, Unjust Enrichment, and the Importance of Knowing the Difference Between the Two," 58 N.Y.U.Ann.Surv.Am.L. 651 (2003).

64 Comment, supra, 9 Conn.Ins.L.J. at 230. The student properly observes that the key is to find a way for a Connecticut court to declare that the policies were illegal or immoral under then-contemporary Connecticut law. Given Connecticut's status as both a headquarters for the insurance industry and as a New England state, where abolitionists were at their strongest prior to the Civil War, it is possible that further legal research might enable a court to accept such an argument. See, e.g., John Pope Melish, *Disowning Slavery: Gradual Emancipation and "Race" in New England, 1780–1860* (Ithaca, Cornell University Press, 1998) (focusing on abolitionist movement in Connecticut and Rhode Island).

65 Comment, supra, 9 Conn.Ins.L.J. at 231–38.

Yet another alternative would be to seek out ways to litigate under state law to address present-day inequities, especially those which disproportionately impact African Americans. Although such claims admittedly would bear only tangential resemblance to a claim for reparations for slavery per se, to the extent present day conditions are vestiges of slavery (in a social and historical, if not necessarily in a legally cognizable sense), as a practical matter, they might achieve some relief for the same people living today who would be the beneficiaries of any successful reparations suit. As these suits would seek forward-looking remedies on behalf of present day victims of present day violations of rights, they would not suffer from many of the difficulties slavery reparations suits face in U.S. state and federal courts.

To give some examples in brief, litigants have had some success in New Jersey state courts in addressing inequities in the availability of low income housing in all municipalities.[66] Litigants in New Jersey have also had some success in addressing inequities in funding public schools, with the goal of improving the funding available for poor urban districts.[67] Litigants in Connecticut have succeeded in obtaining judicial orders for integration of city and suburban school districts.[68] Pending in California, with a 2004 trial date, is a class action suit filed in state court on behalf of low-income students alleging that the state has failed in its obligations to these students to ensure that they enjoy a minimum level of school quality and do not have to endure outdated textbooks, unqualified teachers and grossly substandard buildings.[69] A careful survey of other states' constitutions may reveal other promising vehicles to assert affirmative rights on behalf of carefully drawn classes of state citizens which would yield meaningful benefits for African Americans.[70]

IV. CONCLUSION

Posner and Vermeule's proposed framework for considering reparations plans should shape our discussion and debate. The reparations cases discussed

66 *Southern Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713 (N.J. 1975), appeal dismissed and cert. denied, 423 U.S. 808 (1975) ("Mount Laurel I"), and *Southern Burlington City NAACP v. Township of Mount Laurel*, 456 A.2d 390 (N.J. 1983) ("Mount Laurel II"). For one recent assessment of the impact of these widely discussed opinions, see Peter H. Schuck, "Judging Remedies: Judicial Approaches to Housing Segregation," 37 Harv. C.R.-C.L. L. Rev. 289 (2002).

67 The series of cases are carefully reviewed in Paul L. Tractenberg, "The Evolution and Implementation of Educational Rights Under the New Jersey Constitution of 1947," 29 Rutgers L.J. 827 (1998).

68 Sheff v. O'Neill, 678 A.2d 1267 (Conn. 1996) (holding that Connecticut has an affirmative constitutional obligation to eliminate de facto segregation in Hartford-area public schools). For recent commentary on the impact of this litigation, see, e.g., Richard D. Kahlenberg, *The New Brown*, 2003-June Legal Aff. 30; Comment, "Enforcing Affirmative State Constitutional Obligations and Sheff v. O'Neill," 151 U. Pa. L. Rev. 277 (2002).

69 The case is described in Nanette Asimov, "Bitter Battle Over Class Standards," S.F. Chronicle (May 5, 2003).

70 For one ambitious effort, see Joseph R. Grodin, "Rediscovering the State Constitutional Right to Happiness and Safety," 25 Hastings Const. L.Q. 1 (1997). Other affirmative obligations are considered in Comment, *supra* note 68, 151 U. Pa. L. Rev. 277.

provide a fairly good sense of the difficult course ahead for any broad-brush litigation strategy in U.S. courts. The work of scholars such as Brophy and Jordan show some examples of how to begin to overcome some of the doctrinal difficulties in these cases. U.S. states may also prove to be a fertile ground for legislative or judicial solutions. There may be particular state legislatures that would be amenable to passing legislation along the lines of California's which would further the slavery reparations debate. Existing state law, including constitutions, may also prove to be the basis of pre-existing affirmative obligations, which if enforced, might provide some of the relief that the proponents of slavery reparations seek.