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The Slave Redress Cases

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I. INTRODUCTION

Litigation provides an avenue of civil redress for past atrocities. Victims use the courts to exact justice from their perpetrators.[1] This approach to redressing past atrocities—what can be called the "tort model"—emphasizes compensation of victims and, sometimes, punishment of perpetrators.[2] Black Americans have invoked the tort model by filing lawsuits seeking "slave redress," by which I mean redress for the atrocities of slavery and Jim Crow. These lawsuits have proliferated in recent years. Cases have been filed against the United States government and state governments for authorizing, protecting, and prolonging slavery and Jim Crow ("public actions").[3] Cases have also been brought against private parties, mainly corporations thus far, for unjust profits their predecessors-in-interest received from slavery ("private actions").[4] All the actions decided thus far (a few private actions have yet to be decided) have been dismissed on procedural grounds.

This article attempts to bring some organization and perspective to the growing number of slave-redress cases and the growing body of literature on these cases.[5] The approach taken herein is informed by

1. *See generally* WHEN SORRY ISN'T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND HUMAN INJUSTICE 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) (Roy L. Brooks ed.,1999) [hereinafter WHEN SORRY ISN'T ENOUGH].

2. The tort model stands in contrast with the "atonement model." In the atonement model, the victim seeks a genuine apology from the perpetrator first and foremost. Though the atonement model is necessarily a legislative approach to redress, the tort model can be pursued through legislation or adjudication, but appears primarily in the form of the latter. A legislative illustration of the tort model can be found in the Rosewood Compensation Act of 1994, 1194 Fla. Laws ch. 94-359, wherein the state of Florida provided compensation without an apology to the victims of the 1923 Rosewood race riot. For a discussion of the Act, *see, e.g.*, Kenneth B. Nunn, *Rosewood*, in WHEN SORRY ISN'T ENOUGH, *supra* note 1, at 435.

3. *See, e.g.*, Alexander v. Governor of Oklahoma, 2004 U.S. Dist. LEXIS 5131 (March 19, 2004), *aff'd* 2004 U.S. App. LEXIS 18957 (10 Cir. 9/8/04); Obadele v. United States, 52 Fed. Cl. 432 (2002); Bell v. United States, 2001 U.S. Dist. LEXIS 14812 (N.D. Tex. 2001).

4. *See, e.g.*, Porter v. Lloyds of London, Docket No. 02-CV-6180 (N.D. Ill. filed August 29, 2002); Barber v. New York Life Ins., Docket No. 02-CV-2084 (D.N.J. filed May 2, 2002); Carrington v. FleetBoston Fin. Corp., Docket No. 2000scv01863 (E.D.N.Y. filed March 26, 2002); Ntzebesa v. Citicorp, Inc., Docket No. 2002cv01862 (E.D.N.Y. filed June 19, 2002); Farmer-Paellmann v. FleetBoston Fin. Corp., C.A. No. 1:02-1862 (E.D.N.Y. 2002); *In re* African-American Slave Descendants Litig., 231 F. Supp. 2d 1357 (J.P.M.L. 2002); Hurdle v. FleetBoston Fin. Corp., Case No. CGC-020412388 (S.F. Super. Ct. 2002). These cases have been transferred to the Northern District of Illinois pursuant to 28 U.S.C. § 1407. *See In re* African-American Slave Descendants Litigation, 304 F. Supp. 2d 1027 (N.D. Ill. 2004).

5. *See, e.g.*, RANDALL ROBINSON, THE DEBT: WHAT AMERICA OWES TO BLACKS (2000); Eric A. Posner and Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689 (2003); Robert Westley, *Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?*, 40 B.C. L. REV. 429 (1998); Vicene Verdun, *If the Shoe Fits, Wear It: An Analysis of Reparations to African Americans*, 67 TUL. L. REV. 597 (1993); Charles Krauthammer, *Reparations for Black Americans*, TIME, December 31, 1990, at 18. Although Posner and Vermeule attempt to raise moral questions beyond the realm of litigation, they miss

the "precedents," the history of racial dynamics in this country, the litigants' intentions, and the creative possibilities that come from within existing legal structures. I will also unearth the normative underpinning of slave-redress cases.

My discussion is structured as follows: Parts II and III begin with a discussion of the "precedents" organized around two sets of legal paradigms. The first (Part II) involves the Japanese and Nazi forced labor cases brought against foreign governments (or their successors-in-interest) and foreign corporations (or their successors-in-interest). These defendants are typically sued in United States federal court under the Alien Torts Claims Act, which gives a federal court "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[6] The second set of "precedents" (Part III) is the Japanese American removal and internment cases brought against the federal government. These cases allege violations under the Constitution and federal statutes.

Both sets of "precedents" are negative (hence they are not truly legal precedents) in that they demonstrate an unmistakable judicial indisposition toward lawsuits that seek redress for past injustices. In the absence of special legislation or settlement, these lawsuits have been dismissed before the judge has had an opportunity to consider the merits of the claims at trial. Procedural barriers—including questionable subject matter jurisdiction due to problems of sovereign immunity or the "political question doctrine," the lack of a clear right of action, and violations of applicable statutes of limitations—have resulted in pretrial dismissals of every unsettled case.

Parts IV and V discuss the slave-redress cases—public actions and private actions, respectively. Every slave-redress lawsuit decided thus far has met with a similar fate. It may be possible, however, to overcome some of these legal barriers in recently filed private actions. Viable common-law rights of actions based on the "excesses" of slavery (e.g., the wanton killing of a slave by its corporate master)[7] as well as a frontal attack on slavery itself (under a gains-based theory of restitution) may be possible.

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many of the important conceptualizations discussed in such works as POLITICS AND THE PAST: ON REPAIRING HISTORICAL INJUSTICES (John Torpey ed., Rowman & Littlefield 2003); ELAZAR BARKAN, THE GUILT OF NATIONS: RESTITUTION AND NEGOTIATING HISTORICAL INJUSTICES (2000); Mark Gibney and Erik Roxstrom, *The Status of State Apologies*, 23 HUM. RTS. Q. 911 (2001).

6. 28 U.S.C. § 1350 (2000).

7. Corporations as well as individuals held slaves. Several "private actions" discussed later in this article are being brought against some of these corporations. *See infra* Part V.

I conclude in Part VI with an argument regarding the normative basis of the slave-redress cases, an argument that is rarely made by proponents of this type of litigation. My argument is essentially as follows: much like the civil rights cases culminating with *Brown v. Board of Education*,[8] in which the Supreme Court overturned school segregation statutes, the slave-redress cases provide an important test of the moral credibility of American law. That is, given the compelling morality of the slave descendants' claims, there must be a basis in current law for their redress. Otherwise, our law embodies America's worst atrocity and the corrupt laws that made that atrocity possible.

I doubt that this normative argument, had it been presented, would have changed the results in the slave-redress cases already decided or will have an effect in future cases. The problem, as I argue in the Part VI, inheres in our legal system, not in the slave-redress cases. The problem, in other words, is structural. Civil litigation in this country operates under a retributive model of justice—"legal justice"—rather than a restorative model of justice— "moral justice." The latter has to become the norm if slave-redress cases are ever to become successful.

II. Forced Labor Litigation

A. *Overview*

Forced labor litigation consists of dozens of class action lawsuits brought by private citizens and World War II veterans of both the United States and Allied Forces. Named as defendants in these lawsuits are the governments and corporations of Japan and Germany.[9] Plaintiffs in these lawsuits seek damages for unpaid wages and injuries arising from the labor they were forced to perform under inhumane conditions while being held captive or as POWs during World War II.[10] They assert claims under federal constitutional and statutory law, state constitutional, statutory, and domestic as well as international common law (or customary international law).[11] These lawsuits have been dismissed on numerous grounds, primarily for lack of subject matter jurisdiction, violation of sovereign immunity, and expiration of the statute of limitations.[12]

8. 347 U.S. 483 (1954).

9. *See, e.g., In re* Nazi Era Cases Against German Defendants Litig., 198 F.R.D. 429 (D.N.J. 2000); Princz v. Federal Republic of Germany, 26 F.3d 1166 (D.C. Cir. 1994); Burger-Fischer v. Degussa AG, 65 F. Supp. 2d 248 (D.N.J. 1999); Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424 (D.N.J. 1999); Fishel v. BASF Group, 175 F.R.D. 525 (S.D. Iowa 1997); *In re* World War II Era Japanese Forced Labor Litig., 164 F. Supp. 2d 1160 (N.D. Cal. 2001); Joo v. Japan, 172 F. Supp. 2d 52 (D.D.C. 2001).

10. *See* cases cited *supra* note 9.

11. *See* cases cited *supra* note 9.

12. *See* cases cited *supra* note 9.

B. *Japanese Forced Labor Litigation*

In re World War II Era Japanese Forced Labor Litigation,[13] decided in 2001, may be the most important of the Japanese forced labor cases. The federal judge in this California case consolidated several class action lawsuits brought by plaintiffs of Korean and Chinese descent against the Japanese government. Plaintiffs asserted a number of claims. One set of claims was based not on statutory or constitutional law, but on judge-made common law. These claims alleged false imprisonment, assault and battery, conversion, *quantum meruit*, unjust enrichment, constructive trust, and accounting.[14] *Quantum meruit* and unjust enrichment are recurring claims in redress litigation and, hence, warrant further comment.

Quantum meruit "literally means 'as much as he deserves.'"[15] It is a quasi-contract action that seeks to obtain "the reasonable worth or value of services rendered for the benefit of another."[16] *Quantum meruit* will lie for the reasonable value of services rendered "even though there was no contract to do so."[17] In other words, "the law implies an understanding or intent to pay the value of services rendered,"[18] "unless there is a specific agreement that the services will be performed gratuitously."[19]

Unjust enrichment is a much more complex legal concept than *quantum meruit*. It is generally defined as "the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience."[20] Some states require an additional showing of "the absence of law barring the remedy"[21] sought through the unjust enrichment claim, whereas other states require only a showing that "the defendant received a benefit from the plaintiff . . .[and that] it would be inequitable for the defendant to retain such benefit."[22] Most courts seem to require the initial taking of the property to be

13. 164 F. Supp. 2d 1160 (N.D. Cal. 2001).

14. *Id.* at 1182.

15. Marta v. Nepa, 385 A.2d 727, 730 (Del. 1978).

16. *Id.*

17. United States v. Snider, 779 F.2d 1151, 1159 (6th Cir. 1985).

18. Tustin Elevator & Lumber Co. v. Ryno, 129 N.W. 2d 409, 414 (Mich. 1964).

19. Bellanca Corp. v. Bellanca, 169 A.2d 620, 623 (Del. 1961). Most jurisdictions require that circumstances must show that "the recipient of the benefit [was put] on notice that she (plaintiff) expected to be paid for her services." Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 471 (D.N.J. 1999); *See also Bellanca Corp.*, 169 A.2d at 623.

20. 66 AM. JUR. 2D *Restitution and Implied Contracts* §9 (1973). *See, e.g., Iwanowa*, 67 F. Supp. 2d at 471 (cases cited therein).

21. *Iwanowa*, 67 F. Supp. 2d at 471.

22. *Id. See, e.g.*, Cantor Fitzgerald, L.P. v. Cantor, 724 A.2d 571, 585 (Del. Ch. 1998) (adopting the limited rule); Dumas v. Auto Club Ins. Ass'n, 473 N.W.2d 652, 663 (Mich. 1991) (adopting the liberal rule).

unlawful, which, of course, would make the doctrine inapplicable to slave redress litigation because slavery and Jim Crow were legal when they were practiced. But the trend in the law seems to be that the enrichment need only lack "an adequate legal basis" rather than no legal basis.[23] Perhaps it could be argued that slavery and Jim Crow, though legal, did not provide an "adequate legal basis" for the enrichment.

Unjust enrichment is a necessary element or precondition of the larger claim of restitution. The restitutionary claim affirmatively seeks the return of the benefit for which it would be unconscionable for the defendant to retain.[24] The close relationship between unjust enrichment and restitution is highlighted in Black's Law Dictionary's definition of the former. Unjust enrichment is defined therein 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."[25] Thus, restitution is simply the claim that "[a] person who has been unjustly enriched at the expense of another is required to . . . [provide redress] to the other."[26]

Though traditionally applied only to individual relationships, the concept of unjust enrichment, Joe Feagin argues:

> [Should] be extended . . . to the unjust theft of labor or resources by one group, such as white Americans, from another group, such as black Americans. . . . [F]or fourteen generations the exploitation of African Americans has redistributed income and wealth earned by them to generations of white Americans, leaving the former relatively impoverished as a group and the latter relatively privileged and affluent as a group.[27]

Similarly, Patricia Williams argues, "If a thief steals so that his children may live in luxury and the law returns his ill-gotten gains to its rightful owner, the children cannot complain that they have been deprived of what they did not own."[28] Feagin notes that Williams, like other legal scholars, including Ian Ayres and Richard Delgado, have

23. "The American Law Institute notes in its proposed draft of the Restatement Third, Restitution that the term 'unjust enrichment' is a term of art, and that the substantive part of the law of restitution is concerned with identifying those forms of enrichment that the law treats as 'unjust' for the purpose of imposing liability. . . . [T]he term ['unjust enrichment'] refers to . . . enrichment that lacks an adequate legal basis." 66 AM. JUR. 2D *Restitution and Implied Contracts* §9 (2002).

24. *See, e.g.*, Fleer Corp. v. Topps Chewing Gum, Inc., 539 A.2d 1060, 1063 (Del. 1988).

25. BLACK'S LAW DICTIONARY 1377 (5th ed. 1979).

26. Kammer Asphalt Paving Co. v. East China Township Sch., 504 N.W.2d 635, 640 (Mich. 1993).

27. JOE R. FEAGIN, RACIST AMERICA: ROOTS, CURRENT REALITIES, AND FUTURE REPARATIONS 18 (2000).

28. PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 101 (1991).

also suggested extending the equitable concept of unjust enrichment "to discuss the reality and consequences of racial oppression."[29]

Typical of forced labor cases, the court in *Japanese Forced Labor Litigation* never reached the merits of these intriguing common law claims. The judge ruled that these claims were barred by the statute of limitations.[30] He reached that decision by applying California's choice of law rules to determine which statute of limitations applied—that of the forum state (California) or that of the place wherein the events took place (China and Japan)—and then noting that it did not matter which forum's law applied "because the statutes of limitations from all three forums are significantly shorter than the age of these claims."[31] The limitation periods were one to three years, depending on the claims, under California law; two years under Chinese law; and ten years under Japan's Civil Code.[32] Thus, in order for the claims to have been seasonal, they would have had to be brought within one to ten years after they occurred.

A second set of claims brought by plaintiffs in the *Japanese Forced Labor Litigation* were based on California constitutional and statutory law, specifically: Article I of the Constitution and Penal Code § 181 (both of which prohibit involuntary servitude); the Unfair Competition Act (UCA), which is part of the California Business & Professional Code; and § 354.6 of the California Code of Civil Procedure.[33] Like the common law claims, the state constitutional and statutory claims were dismissed before the judge could rule on their merits. The judge ruled, for example, that the claims were barred by applicable statutes of limitations, and that he lacked subject matter jurisdiction (federal constitutional authority to decide the case) because the claims essentially raised political questions in violation of the political question doctrine.[34] First announced by Chief Justice Marshall in *Marbury v. Madison*,[35] the political question doctrine basically holds, to quote Chief Justice Marshall, that "questions, in their nature political . . . can never be made in this court."[36]

Of special note is the judge's ruling on California's innovative redress law, California Code of Civil Procedure § 354.6. This unique provision was the primary claim on which plaintiffs relied.[37] Section

29. FEAGIN, *supra* note 27, at 18 (sources cited therein).
30. *In re* World War II Era Japanese Forced Labor Litig., 164 F. Supp. 2d 1160, 1182-83 (N.D. Cal. 2001).
31. *Id.* at 1182.
32. *Id.*
33. *See generally Japanese Forced Labor Litig.*, 164 F. Supp. 2d 1160.
34. *Id.* at 1165.
35. 5 U.S. (1 Cranch) 137 (1803).
36. *Id.* at 170.
37. *Japanese Forced Labor Litig.*, 164 F. Supp. 2d at 1164.

354.6 was enacted in 1999 to provide a cause of action for any Second World War slave or forced labor victim or heir of such victim to "recover compensation for the labor performed . . . from any entity or successor in interest thereof. . . ."[38] Procedurally, § 354.6. extends the applicable statute of limitations to December 31, 2010.[39] Thus, § 354.6 grants both substantive and procedural rights. The judge in the *Japanese Forced Labor Litigation*, however, invalidated § 354.6 on the basis of the political question doctrine, holding that the provision was an unconstitutional infringement on "the exclusive foreign affairs power of the United States."[40] Importantly, the judge did not rule that the 1952 San Francisco Treaty of Peace with Japan, which formally ended World War II in the Pacific, preempted § 354.6. Unlike an earlier case, in which the judge ruled that the Treaty of Peace waived individual forced-labor claims brought by United States and Allied veterans against Japan,[41] the case *sub judice* involved nationals of nations (Korea and China) that were not signatories to the Treaty of Peace.[42]

It should be noted that the questions of whether § 354.6 violates the political doctrine question and is preempted by the Treaty of Peace is on appeal before the California Supreme Court at the time of this writing.[43] The justices are reviewing a 2003 decision by a state court of appeals which agreed with the waiver ruling issued in the *Japanese Forced Labor Litigation* (again, a federal court ruling) but did not agree with that court's ruling on the political question doctrine.[44] It is likely the California Supreme Court will rule the same way other courts have ruled on the waiver issue—in other words, it will allow nationals of non-signatories (e.g., Korea and China) to sue Japanese corporations while denying such a right to nationals of signatories (the United States and her Allies). If the California Supreme Court sustains the state appellate court's ruling on the political question doctrine (namely, that § 354.6 does not violate that doctrine), state and federal law will collide, as the federal judge in the *Japanese Forced Labor Litigation* ruled just the opposite. Eventually, the United States Supreme Court will have to resolve the matter.

The final claim alleged in the *Japanese Forced Labor Litigation* was asserted under an ancient federal statute—the Alien Torts Claims Act

38. CAL. CIV. PROC. CODE § 354.6(b) (West 2003).
39. CAL. CIV. PROC. CODE § 354.6(c) (West 2003).
40. *Japanese Forced Labor Litig.*, 164 F. Supp. 2d at 1168.
41. *In re* World War II Era Japanese Forced Labor Litig., 114 F. Supp. 2d 939, 942 (N.D. Cal. 2000).
42. *See Japanese Forced Labor Litig.*, 164 F. Supp. 2d at 1163-68.
43. *See* Taiheiyo Cement Corp. v. Superior Court, 129 Cal. Rptr. 2d 451 (Cal. Ct. App. 2003), *review granted* 133 Cal. Rptr. 2d 147 (Cal. 2003).
44. *See Id.* (holding that § 354.6 did not violate the political question doctrine and was not preempted by the Treaty of Peace because Korea was not a signatory and plaintiff is Korean).

(ATCA).[45] Originally enacted in the Judiciary Act of 1789 to create a right of action against nefarious nations, the ATCA gives a federal court "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[46] The ATCA gives federal district courts subject matter jurisdiction to entertain suits against state actors or private actors "alleging torts committed anywhere in the world against aliens in violation of the law of nations."[47] Since the ATCA has no statute of limitations, courts are instructed to "borrow" from the most suitable statute of limitations. In this case, the judge borrowed from the ten-year limitation period contained in the Torture Victim Protection Act,[48] which provides a cause of action in federal court to victims of torture around the world. As plaintiffs' claims were not filed within ten years of their occurrence, their ATCA action was dismissed on statute of limitations grounds.[49]

In dismissing the ATCA claim on statute of limitations grounds, the judge made several observations, by way of *obiter dictum*, that, taken together, may appear to be useful in the slave-redress cases. The judge cited a line of cases that have included "customary international law," or *jus cogens*, in the definition of "the law of nations."[50] This, then, makes *jus cogens* violations actionable under the ATCA. In addition, the judge ruled that the prohibition against slavery is "specific, universal and obligatory."[51] The prohibition, in other words, is among those "widely held fundamental principles of civilized society that . . . constitute binding norms on the community of nations."[52]

Thus, this analysis of international law establishes precedents—affirmative *stare decisis*—to the effect that slavery is a violation of customary international law and, hence, the law of nations, that the prohibition against slavery is "implicit in International Law."[53] This law, in addition, predates World War II. That is, it was understood prior to World War II that "to enslave . . . is an international crime."[54] Though slave descendants, like all United States citizens, cannot sue under the ATCA, which is only available to aliens, they can bring an

45. *See Japanese Forced Labor Litig.*, 164 F. Supp. 2d at 1178-83.
46. 28 U.S.C. § 1350 (2000).
47. Kadic v. Karadzic, 70 F.3d 232, 236 (2d Cir. 1995).
48. 28 U.S.C. § 1350 (2000) notes. The TVPA was enacted in 1991 as a statutory note to the ATCA.
49. *See Japanese Forced Labor Litig.*, 164 F. Supp. 2d at 1179-82.
50. *Id.* at 1178.
51. *Id.*
52. *Id.* (cases cited therein); Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 439 (D.N.J. 1999) (cases cited therein).
53. *Iwanowa*, 67 F. Supp. 2d at 440-41.
54. *Id.* at 440 (citing Robert Jackson, the Nuremburg prosecutor, in his final report to President Truman).

international claim under other federal statutes discussed below in the section on private actions.

But while the judge's analysis is critical for the forced labor cases, it has little utility for the slave-redress cases. International law contains doctrines that cutoff historical claims going back as far as slavery. One such doctrine is the dominant theory of rights. This doctrine holds governments blameless for acts committed by predecessor regimes—acts for which they obviously could not control.[55] Slave-redress claims based on the portion of slavery that predated the founding of the United States of America in 1787 would, therefore, not be actionable under international law. A more devastating procedural doctrine for slave-redress litigation is the doctrine of inter-temporal law. Recognized by several major international conventions, including the Universal Declaration of Human Rights (1948), the European Convention for the Protection of Human and Fundamental Freedoms (1950), and the International Covenant on Civil and Political Rights (1966),[56] in criminal proceedings, the doctrine of inter-temporal law has been adopted in civil proceedings by the International Law Commission (ILC), a distinguished group of international law judges and legal scholars. Article 13 of the ILC's Articles on State Responsibility provides: "An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs."[57]

A final blow to slave-redress claims based on international law is the fact that most legal scholars have determined that slavery was not illegal during its practice in the United States. Neither *jus cogens*, treaties nor conventions outlawed human bondage until sometime during the late nineteenth century. Slavery was not illegal under multilateral treaties or conventions until "somewhere between 1885 (the Treaty of Berlin forbidding slave-trading) and 1926, when the Slavery Convention confirmed that states had jurisdiction to punish slavers wherever they were apprehended."[58] The United States, then, was ahead of international law in banning slavery with the ratification of the Thirteenth Amendment on December 6, 1865. On this ground, it must be

55. *See, e.g.*, Max du Plessis, Reparations and International Law: How Are Reparations to be Determined (Past Wrongs or Current Effects), Against Whom, and What Form Should They Take? 10-11, n.15 (June 12-14, 2003) (paper delivered at the 2003 CLEA Conference on "Reparations: Theory, Practice and Legal Education," held at University of Windsor Faculty of Law, Windsor, Ontario, Canada) (on file with author).

56. *Id.* at 26 n.19.

57. *Id.* at 5 (quoting Article 13).

58. *Id.* at 6 (quoting sources).

said that international law establishes no cognizable claim based upon the historic wrong of slavery.[59]

Although it did not arise in the *Japanese Forced Labor Litigation*, the sovereign immunity issue is a recurring obstacle to cases filed against foreign governments. Sovereign nations are cloaked with immunity even though they are otherwise subject to federal jurisdiction under the ATCA. A recent illustration of this limitation is a federal class action suit brought by fifteen foreign women who were victims of sexual slavery and torture at the hands of the Japanese Imperial Army in Japanese-occupied Asia before and during World War II (the so-called "Comfort Women").[60] The judge suggested that the Foreign Sovereign Immunity Act of 1976 (FSIA),[61] which grants presumptive immunity, with several exceptions, to foreign nations sued in United States courts,[62] might apply retroactively to World War II and even before that time.[63] Prior to 1952, foreign sovereigns were granted immunity in United States courts only at the discretion of the executive branch. Thus, a state-defendant under the ATCA may be able to claim immunity for acts committed long ago. The judge in the Comfort Women case did not, however, decide the immunity issue before him, including the issue of whether the FSIA applied retroactively.[64] Instead, he disposed of the lawsuit on another ground; namely, that the Comfort Women claims were nonjusticiable. In other words, the claims violated the political question doctrine discussed earlier.[65]

The fact that the judge chose to dispose of the Comfort Women class action lawsuit on jurisdictional grounds, based not on sovereign immunity but on nonjusticiability, highlights what will likely be a recurring problem in the slave-redress cases filed against governments. Cases seeking judicial redress against a government for the latter's commission of a past injustice may be too hot for courts to handle—too political. Courts may feel this question is more suited for a legislative rather than a judicial solution. The nonjusticiability, or political question doctrine, may well hang over the slave-redress cases like the sword of Damocles.

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59. Interestingly, genocide only became outlawed in international law after World War II. The Nazi war criminals were not convicted of genocide during the Nuremburg trials. They were convicted of committing "crimes against humanity," a generic *jus cogens* concept, which incorporates genocide after World War II. *See id.* at 27 n.21 (sources cited).

60. For a discussion of the Comfort Women, *see* WHEN SORRY ISN'T ENOUGH, *supra* note 1, at 83-151.

61. Foreign Sovereign Immunity Act, 28 U.S.C. §§ 1605-1607 (1976).

62. *See id. See also* Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989).

63. *See* Joo v. Japan, 172 F. Supp. 2d 52, 56-59 (D.D.C. 2001). *See also* WHEN SORRY ISN'T ENOUGH, *supra* note 1, at 83-151.

64. *See generally Joo*, 172 F. Supp. 2d 52.

65. *Id.* at 64-67.

C. *Nazi Forced Labor Litigation*

1. Princz v. Federal Republic of Germany

Though sovereign immunity was a principal defense in the Japanese forced labor litigation, it was first raised in a forced labor case brought against Germany. *Princz v. Federal Republic of Germany*[66] is one of the first and certainly the most famous of the Nazi forced labor cases. It occupies a special place in the annals of forced labor cases not only because it was one of the first such cases, broaching many of the procedural issues that would prove decisive in subsequent cases, but also because of its rather unique factual pattern.

Hugo Princz, a Jewish American, was a Holocaust survivor. At the time the United States declared war against Germany in 1942, he was living with his parents, his sister, and his two brothers in what is now Slovakia (formerly Czechoslovakia).[67] The Court described Princz's experience during the Holocaust as follows:

> The Slovak police arrested the entire Princz family as enemy aliens, and turned them over to the Nazi SS. Rather than allow the Princz family to return to the United States as part of the civilian prisoner exchange then being conducted by the Red Cross, . . . the SS sent the family to concentration camps. [The decision turned solely on the fact that the Princz family was Jewish.] Mr. Princz's parents and his sister were [sent to] Treblinka, [where they were eventually murdered,] while Mr. Princz and his two younger brothers were sent to Auschwitz and then to Birkenau, where they were forced to work at an I.G. Farben chemical plant. After being injured at work, Mr. Princz's brothers were starved to death in the "hospital" at Birkenau. Mr. Princz was later sent to Dachau, where he was forced to work in a Messerschmidt factory. When United States soldiers liberated Dachau at the end of the war, Mr. Princz was in a freight car full of concentration camp prisoners en route to another camp for extermination. The other liberated prisoners were sent to displaced persons camps, but because Mr. Princz [was] an American he was sent to an American military hospital for treatment. After the war, the government of the new Federal Republic of Germany [unlike Japan,] established a program of redress for Holocaust survivors. . . .[68]

Germany's redress program was, in fact, a reparations program,[69] and thus will be referred to as such in this discussion. More than that,

66. 26 F.3d 1166 (D.C. Cir. 1994).

67. *Id.* at 1168

68. *Id.*

69. Properly speaking, a "reparation" is a form of redress that follows an apology made by the legislature or head of state. It is a response to an atrocity that seeks atonement. For further discussion, *see* ROY L. BROOKS, *The Age of Apology, in* WHEN SORRY ISN'T ENOUGH, *supra* note 1, at 3, 8-9.

Germany's approach to redress has become the model for all others.[70] According to a recent report by the United Nations, Germany's reparations program, which also provided funds for the new state of Israel, is "the most comprehensive and systematic precedent of reparations by a Government to groups of victims for the redress of wrongs suffered."[71] Despite this exemplary record,

> "[t]he German government denied Mr. Princz's 1955 request for reparations . . . because he was neither a German citizen at the time of his imprisonment nor a 'refugee,' within the meaning of the Geneva Convention, after the war. . . . Mr. Princz would have [however] qualified for reparations when the German government changed the criteria for eligibility in 1965 had he applied again before the statute of limitations ran out in 1969."[72]

"Joined by the United States Department of State and members of the New Jersey congressional delegation,"[73] Princz began in 1984 to initiate "a series of requests to the German government"[74] and I.G. Farben's United States subsidiaries, BASF, Hoechst, and Bayer Corporations, "for reparations in the form of *ex gratia* payments or the establishment of a pension fund; all such requests were denied."[75] With the "1991 Treaty on the Final Settlement with Respect to Germany . . . awaiting ratification by the Senate, the Bush administration [renewed its attempt] to resolve Mr. Princz's claim through diplomatic channels."[76] That effort failed, as did similar attempts made later by the Clinton Administration.[77]

In 1992, Princz filed a lawsuit in federal court against Germany alleging both tort and quasi-contract claims, all common law claims.[78] The former were for false imprisonment, assault and battery, negligence, and intentional infliction of emotional distress, while the latter was for *quantum meruit* based on the "value of his labor in the I.G. Farben and Messerschmidt plants."[79] Germany moved to dismiss on grounds that it was cloaked with sovereign immunity, which thereby removed the case from within the court's subject matter jurisdiction.[80]

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70. *See generally* ROY L. BROOKS, *A Reparations Success Story*? *in* WHEN SORRY ISN'T ENOUGH, *supra* note 1 at 17, 19. (noting that Germany's redress program is "an exemplar of meaningful national atonement for past wrong doing").

71. *In re* Nazi Era Cases Against German Defendants Litig., 198 F.R.D. 429, 431 n.4 (D.C.N.J. 2000) (citing U.N. sources).

72. *Princz*, 26 F.3d at 1168.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

Germany also argued that Princz failed to state a claim upon which relief could be granted due to the expiration of the statute of limitations.[81] The district court ruled that it had jurisdiction on the ground that the FSIA "has no role to play where the claims alleged involve undisputed acts of barbarism committed by a one-time outlaw nation which demonstrated callous disrespect for the humanity of an American citizen, simply because he was Jewish."[82] The court of appeals, however, reversed on the jurisdictional issue.[83] It ruled that Princz was caught in a legal catch-22:

> If the FSIA applies retroactively to the terrible events giving rise to this case, then it bars the suit, which comes within no exceptions in the Act. If instead the case is governed by pre-FSIA law of sovereign immunity, then it is not within post-FSIA diversity jurisdiction of the district court.[84]

When Congress enacted the FSIA, it deleted the grant of diversity jurisdiction over cases brought by a United States citizen against a foreign state.[85] Thus, the court, like the court in the *Japanese Forced Labor Litigation*, did not decide the choice of law issue presented by the fact that the FSIA was enacted in 1976, long after the events in question.

Princz, unlike the *Japanese Forced Labor Litigation*, brought only common law claims. This path is also taken in some of the slave-redress cases, as we shall see. Rather than relying on federal constitutional or statutory law, both of which upheld the institution of slavery, some plaintiffs in the slave-redress litigation advance traditional tort and quasi-contract claims. These nonfederal claims invoke the federal court's diversity jurisdiction, which, in general, gives the district court subject matter jurisdiction over nonfederal claims between parties who are citizens of different states. *Princz* lacked such jurisdiction because the FSIA amended a portion of the diversity statute to remove therefrom cases brought by a United States citizen against a foreign government.[86] The slave-redress cases face a sovereign immunity hurdle of a different but equally lethal nature, as I will demonstrate.

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81. *Id.* at 1168-69.

82. Princz v. Federal Republic of Germany, 813 F. Supp. 22, 26 (D.D.C. 1992).

83. *Princz*, 26 F.3d at 1176.

84. *Id.*

85. *Id.* at 1169, 1176. Federal diversity jurisdiction is provided for on a number of bases in 28 U.S.C. § 1332 (2000).

86. *Id.* at 1170.

2. In re Nazi Era Cases Against German Defendants Litigation

In an effort to avoid the sovereign immunity problem, lawyers litigating Nazi forced labor cases changed their strategy after *Princz*. Rather than suing Germany (a state actor, or a government), lawyers began to target corporations (private actors) who "employed" or benefited from forced labor. During the 1990s, for example, some 53 lawsuits, including 42 putative class actions, were filed in United States federal courts against German companies, mainly banks, insurance, and industrial corporations.[87] Significantly, these defendants had corporate subsidiaries and other substantial assets located within the United States. These assets made them not just "deep pockets," but defendants with collectible assets. Eventually, these dozens of actions were consolidated for litigation in a single case, *In re Nazi Era Cases Against German Defendants Litigation*,[88] in the Federal District Court of New Jersey, on August 4, 2000. But a funny thing happened on the way to the forum: the cases were settled with court approval on November 13, 2000.[89] Plaintiffs were happy to forgo the uncertainty of litigation for the certainty of monetary relief.

This unusual turn of events was occasioned by the passage of a law in Germany, translated as "Law on the Creation of a Foundation 'Remembrance, Responsibility and Future'" (commonly referred to as the "Foundation Law") on August 12, 2000.[90] The Foundation Law took effect on October 19, 2000 with the exchange of diplomatic notes between Germany and the United States.[91] Under the terms of the Foundation Law, Germany and German corporations, in exchange for litigation peace, agreed to make contributions of equal amounts to a fund, for which initial capitalization would be ten billion deutsche mark.[92] Under the terms of the settlement, payments would be made to certain victims of Nazi persecution out of this fund. The class of victims included slave laborers (defined as workers who were "intended to be literally worked to death") and forced laborers (defined as workers who were "compelled to work against their will, but in somewhat less harsh conditions than slave laborers").[93] Also included in the victim class were subjects of medical experimentation, children held in a *Kinderheim* (or children's home), and persons whose property was "aryanized" (stolen or damaged).[94] Significantly, not only the

87. *In re* Nazi Era Cases Against German Defendants, 198 F.R.D. 429, 430 (D.N.J. 2000).
88. 198 F.R.D. 429 (D.N.J. 2000).
89. *Id.* at 447.
90. *Id.* at 432.
91. *Id.*
92. *Id.* at 432-35.
93. *Id.* at 433, 433 nn.9 & 10.
94. *Id.* at 433.

direct victims of these acts, but their immediate descendants were included among the eligible claimants, provided the victims died after February 16, 1999.[95] This settlement is one of the few times a perpetrator of an atrocity provided redress for persons who were not direct victims. This may provide some precedential value for slave-redress.

Madeline Albright, Secretary of State during the Clinton Administration when the Foundation Law was enacted, estimated at the time that one million victims across the United States, Europe, and the rest of the world would receive benefits under the Foundation Law.[96] Though the rate of recovery differs depending on the type of victim, the Foundation Law is supposed to pay up to DM 15,000 for each former slave laborer and up to DM 5,000 for each forced laborer.[97] These amounts are obviously more symbolic than compensatory.[98]

There is little doubt that the Foundation Law would not have been enacted without the confluence of several events. Certainly, the burden of having to defend multiple ATCA cases, most of which were class actions, was motivation for settlement. Though plaintiffs did not face the hurdle of sovereign immunity under FSIA, because the lawsuits were being brought against corporations rather than governments, they still faced a statute of limitations problem.[99] Given the fact that the corporate defendants had a good defense, the settlement did not actually buy the corporate defendants peace from the prospect of having to pay damages based upon a finding of liability. What the settlement did do, however, was to buy the corporate defendants peace from the burden and cost of having to litigate, which was no small matter. The settlement also made good business sense in two ways. First, it made sense to use corporate money, especially when combined with a government bailout, to make the cases disappear rather than to make the lawyers rich. The former was a better return on investment than the latter. Second, by making the cases disappear, the corporate defendants were able to avoid adverse publicity in American markets. It simply does a foreign corporation no good to have to defend dozens of lawsuits in American courts brought by sympathetic, largely American plaintiffs.

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95. *Id.*

96. *Id.*

97. *Id.*

98. *See id.* at 432-33 (citing Foundation Law and several court filings, including Statement of Secretary of State Madeline K. Albright, Declaration of Stuart E. Eizenstat, Clinton Administration's Deputy Secretary of the Treasury and Special Representative of the President and the Secretary of State on Holocaust Issues).

99. For example, the statute of limitations for forced labor claims brought under the ATCA is ten years. *See, e.g., In re* World War II Era Japanese Forced Labor Litig., 164 F. Supp. 2d 1160, 1180 (N.D. Cal. 2001).

More important than the threat of litigation was the pressure brought to bear by plaintiffs' powerful allies at the highest reaches of government and business. President Clinton appointed Under Secretary of State Stuart Eizenstat as his special representative to apply pressure on the German government and to get personally involved in the negotiations.[100] Investment and commercial bankers on Wall Street, who floated German bonds and provided crucial financial capital to German corporations and their United States subsidiaries, also applied pressure. Many of these captains of industry had relatives who were Holocaust survivors or former forced or slave laborers. Thus, they could identify with the plaintiffs' claims.[101]

Many proponents of the tort model are banking on a similar outcome in the slave-redress lawsuits. They are hoping that the proliferation of lawsuits will force a settlement, and that supporters of the Nazi forced and slave labor litigation will throw their support behind this strategy. Yet, I doubt that a settlement is likely unless blacks can exert the kind of political and financial pressure on the federal government and corporations that Jews were able to muster in the Nazi cases. Unless that happens, slave-redress litigation will suffer the same fate as the Japanese forced labor litigation.

Even if the slave-redress litigation did result in the kind of legislative victory that the Nazi forced labor cases have enjoyed, I would not be happy with that result. My dissatisfaction has far less to do with the fact that any legislative payment is likely to be symbolic rather than compensatory, as the Foundation Law well illustrates, than with the fact that no apology is expected under such a legislative scheme. In my view, atonement should be the *sine qua non* of redressing past injustices.[102] Atonement is essential when, as here, monetary amounts can only be symbolic. A deep apology fortifies the symbolism.[103] I shall elaborate upon the necessity of an apology after discussing one more set of "precedents" and the slave-redress cases.

III. JAPANESE AMERICAN REMOVAL AND INTERNMENT

A. *Executive Order 9066*

During World War II, the United States government forcibly removed approximately 120,000 Japanese Americans from their homes

100. For a personal account of Mr. Eizenstat's efforts *see* STUART E. EIZENSTAT, IMPERFECT JUSTICE: LOOTED ASSETS, SLAVE LABOR AND THE UNFINISHED BUSINESS OF WORLD WAR II (2003).

101. For a summary of the negotiations leading up to the historic Foundation Law, as well as other key features of the Law, *see In re* Nazi Era Cases, 198 F.R.D. at 431-37.

102. *See generally* BROOKS, *The Age of Apology*, *in* WHEN SORRY ISN'T ENOUGH, *supra* note 1, at 3-9.

103. *See generally* Brooks, *supra* note 102.

and placed them in internment camps located mainly in the mid-western section of the country.[104] This large-scale operation of removal and internment was conducted without prior criminal indictment or conviction under the authority of Executive Order 9066.[105] Signed by President Franklin Roosevelt on February 19, 1942 and ratified soon after by Congress, Executive Order 9066 ordered the establishment of "military areas" from which any person could be excluded.[106] Executive Order 9066 was followed by other executive orders in quick succession, including Executive Order 9102, issued on March 20, 1942, which created the War Relocation Authority and empowered it "to provide for the removal from designated areas of persons whose removal is necessary in the interest of national security."[107]

Evacuation and internment were cruel and inhumane acts, especially in the context of a free society. Evacuees were given as little as 48 hours advance notice in which to gather the few belongings they were allowed to take.[108] Most evacuees lost their homes, businesses, and personal possessions, sometimes selling them for pennies on the dollar, if lucky.[109] Living conditions in the internment centers were harsh at best. Armed guards stood watch over the internees from high towers.[110] Imprisoned behind barbed wire fences, the internees could not leave the interment centers except in emergencies and then only if accompanied by a white escort. The physical facilities consisted of barracks, a mess hall, common baths, showers, toilets, and laundry facilities, and a recreation hall.[111] "Food, shelter, medical care, and education were provided to the evacuees free of charge, but even when their value was added to the low salaries [some internees received for work they performed], the economic hardship imposed by the internment was obvious."[112]

Government officials alleged that Executive Order 9066 and its progeny were issued out of military necessity.[113] General DeWitt issued a report in 1942 stating that in the wake of the Japanese attack on Pearl Harbor on December 7, 1941, more attacks on American shipping and coastal cities were "probable," as were air raids and sab-

104. Exec. Order No. 9066, 7 Fed. Reg. 1407 (February 19, 1942). Exec. Order No. 9102, 7 Fed. Reg. 2165 (March 20, 1942).
105. Exec. Order No. 9066, 7 Fed. Reg. 1407 (February 19, 1942).
106. *Id.*
107. Exec. Order No. 9102, 7 Fed. Reg. 2165 (March 20, 1942). Exec. Order No. 9066, 7 Fed. Reg. 1407 (February 19, 1942).
108. Hohri v. United States, 586 F. Supp. 769, 775 (D.C.C. 1984).
109. *See generally id.*; WHEN SORRY ISN'T ENOUGH, *supra* note 2, at 152-228.
110. *Hohri*, 586 F. Supp. at 775.
111. *Id.*
112. *Id.*
113. *Id.* at 774, 776-77.

otage of vital command installments along the West Coast.[114] DeWitt's report also claimed that enemy agents within the United States would assist the Japanese attackers, and that the "112,000 individuals of Japanese ancestry living in the area were 'potential enemies' because of their ties to Japan."[115]

DeWitt's security concerns were contradicted at the time by various sources both within and outside the government. Federal Bureau of Investigation Director J. Edgar Hoover, for example, expressly refuted allegations in DeWitt's report that illicit shore-to-ship signaling had occurred in the early days of the war.[116] Also, a Chicago businessman, Curtis B. Munson, sent a report to President Roosevelt and the War Department in November 1941 advising that, "There is no Japanese 'problem' on the Coast. There will be no armed uprising of Japanese."[117] Lieutenant Commander Kenneth D. Ringle, an expert on Japanese intelligence, reported on January 26, 1942, that "at least 75 percent of the American-born United States citizens of Japanese ancestry were loyal to the United States and that a large majority of the alien residents were at least 'passively loyal.'"[118]

Despite these contrary reports, President Roosevelt chose to believe General DeWitt's claim that removal and internment were warranted by military necessity. The Supreme Court took this view in the few cases that reached it from the many lawsuits filed challenging the removal and internment of Japanese Americans.[119] Taking judicial notice of General DeWitt's report (meaning the document was admitted into evidence without cross-examination), the Supreme Court in *Hirabayashi v. United States,*[120] *Yasui v. United States*,[121] and *Korematsu v. United States*,[122] upheld the criminal convictions of three internees who violated the wartime curfew and exclusion orders. The Court ruled, *inter alia*, that these orders were legal under the federal government's constitutional power to wage war.[123]

Shortly after the war, Congress enacted the Evacuation Claims Act of 1948.[124] This Act authorized the Attorney General to 'adjudicate certain claims resulting from evacuation of certain persons of Japa-

114. *Id.* at 776-777
115. *Id.* (quoting DeWitt report).
116. *See, e.g.,* MORTON GRODZINS, AMERICA BETRAYED: POLITICS AND THE JAPANESE EVACUATION 291 (1949).
117. *Hohri*, 586 F. Supp. at 778 (sources cited therein).
118. *Id.* (sources cited therein).
119. For a collection of these lawsuits, *see id.* at 779 n.12.
120. 320 U.S. 81 (1943).
121. 320 U.S. 115 (1943).
122. 323 U.S. 214 (1944).
123. For a discussion, *see Hohri*, 586 F. Supp. at 779-781. *See generally Hirabayashi*, 320 U.S. 81; *Yasui*, 320 U.S. 115; *Korematsu*, 323 U.S. 214.
124. 50 U.S.C. app. § 1981 (1990).

nese ancestry under military orders', but specifically excluded compensation for "loss on account of death or personal injury, . . . or mental suffering" and for "loss of anticipated profits . . . or earnings.'[125] These limitations created an Act that, as some scholars have observed, "resulted in no compensation for most and limited compensation for the others."[126] The Act demonstrates the dangers of allowing the perpetrators of an atrocity to dictate the terms of redress.[127]

Against this background, former internees pursued two courses of litigation in the decades after the war. The first was *coram nobis* litigation brought by three former internees, Gordon Hirabayashi, Minoru Yasui, and Fred Korematsu, to overturn their convictions of violating the wartime curfew and exclusion orders.[128] The second and more important litigation strategy sought redress for all internees, not just those criminally convicted of violating the wartime curfew and exclusion orders. In this litigation, *Hohri v. United States,*[129] plaintiffs sought monetary relief for violations of their constitutional rights and losses to homes and businesses.

B. *Coram Nobis Lawsuits*

Though abolished in civil cases, the ancient writ of *coram nobis* is still available in criminal cases to correct convictions where other remedies are not available.[130] The *coram nobis* lawsuits were successful in that although they did not result in monetary relief, which would have been beyond the scope of the writ of *coram nobis*, they did result in the overturning of petitioners' criminal convictions.[131] The courts issuing the writs declared an injustice and sought to redress it by correcting the historical as well as the legal record on which the Supreme Court had relied in its prior decisions.[132] Henceforth, the record

125. *Id. See also*, ERIC K. YAMAMOTO ET AL., RACE, RIGHTS AND REPARATIONS: LAW AND THE JAPANESE AMERICAN INTERNMENT 427 (2001).

126. YAMAMOTO, *supra* note 125, at 427.

127. *See* BROOKS, *The Age of Apology*, *in* WHEN SORRY ISN'T ENOUGH, *supra* note 1, at 3, 8-9.

128. *See* Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984); Yasui v. United States, 772 F.2d 1496 (9th Cir. 1985); Hirabayashi v. United States, 828 F.2d 591 (9th Cir. 1997).

129. 847 F.2d 779 (Fed. Cir. 1988) (*per curiam* opinion), *aff'g* 586 F. Supp. 769 (D.D.C. 1984) (holding appellants' claims were barred by statute of limitations and sovereign immunity); United States v. Hohri, 482 U.S. 64 (1987) (holding that Federal Circuit rather than the appropriate region court of appeals has jurisdiction in this case); Hohri v. United States, 793 F.2d 304 (D.C. Cir. 1986) (*per curiam* opinion) (request for rehearing *en banc* denied).

130. *See* FED. R. CIV. P. 60(b) abolishing various common law writs. *See also* United States v. Morgan, 346 U.S. 502 (1954).

131. *See Korematsu*, 584 F. Supp. 1406 (N.D. Cal. 1984); *Yasui*, 772 F.2d 1496 (9th Cir. 1985); *Hirabayashi*, 828 F.2d 591 (9th Cir. 1997).

132. *See* cases cited *supra* note 128.

would show that racial prejudice and war hysteria rather than military necessity were the real reasons for the removal and internment of Japanese Americans. Had the Supreme Court in 1943 and 1944 known the true facts, and had evidence surrounding the DeWitt report not been altered or suppressed, the Court would not have given judicial notice to the DeWitt report, and it would not have upheld petitioners' criminal convictions.[133]

The *coram nobis* litigation suggests two precedents for slave redress litigation. One precedent is actually criminal and, therefore, does not fit squarely within the parameters of the tort model, which is quintessentially a civil form of redress. No one goes to jail or is fined under the tort model. But the writ of *coram nobis* can theoretically be used as a kind of tort remedy by blacks to overturn convictions obtained through prosecutorial or even judicial misconduct, especially during the days of Jim Crow. Many blacks now in their 70s and 80s bear the scars of criminal convictions rendered by southern courts forty or fifty years ago. Writing in the midst of that era, Leon Friedman observed:

> Too many southern officials let their emotions and prejudice sway their decisions in only one direction: against the Negro. The result is not isolated injustice or occasional error. An entire pattern and practice is established that effectively overrules the law in the statute books or the Constitution. A new kind of law owing its allegiance only to the hates and fears of the white community governs the day-to-day existence of the southern Negro.[134]

Friedman was summarizing the written accounts of dozens of lawyers who had first-hand experience litigating civil rights cases in the South. In articles titled "A Busy Spring in the Magnolia State," "Municipal Ordinances, Mississippi Style," "Sociology and the Law: A Field Trip to Montgomery, Alabama," "Louisiana Underlaw," "The Case of the Disappearing Docket," "Clarksdale Customs," "Clinton, Louisiana," "The Abdication of the Southern Bar," "Southern Appellate Courts: A Dead End," and "Segregated Justice," these lawyers published their experiences in a collection edited by Friedman titled, *Southern Justice*, which, unfortunately, is now out-of-print.[135] Each lawyer addressed the questions of "how the legal institutions [in the South] have been used to cripple the struggle for Negro rights and

133. For an excellent discussion of the *coram nobis* litigation, *see* YAMAMOTO, *supra* note 125, at 277-387; JUSTICE DELAYED: THE RECORD OF THE JAPANESE AMERICAN INTERNMENT CASES, (Peter Irons ed., Wesleyan University Press, 1989); PETER IRONS, JUSTICE AT WAR: THE STORY OF THE JAPANESE INTERNMENT CASES (1993).

134. Leon Friedman, *Introduction in* SOUTHERN JUSTICE 3, 7 (Leon Friedman ed., Pantheon Books, 1965).

135. *See Id.*

what has been or can be done to protect Negroes from this kind of legal abuse."[136]

Blacks received discriminatory treatment in northern courts as well.[137] But Friedman argued that southern justice was "special"; for example, "northern police [did] not arrest Negroes for distributing handbills or trying to vote. . . . [Southern] judges [had] no difficulty in finding Negroes . . . guilty despite the lack of any evidence of a crime."[138] Southern law was "underlaw." It had "one of the attributes of law—consistency—but it [was] not law that can result in justice. There [was] no equality, desert, consciousness, dignity, regularity or decency in its operation."[139]

I see the writ of *coram nobis* as an instrument of justice that could be used to overturn dozens of improper convictions meted out to blacks under southern underlaw. Like Hirabayashi, Yasui, and Korematsu, whose convictions were overturned forty years after the fact, blacks who were wrongfully convicted during the Jim Crow era, whether for rape, robbery, burglary, theft or murder, should be permitted to file *coram nobis* petitions to undo those convictions. *Coram nobis* would be appropriate upon a showing of prosecutorial or judicial misconduct in the nature of altering or suppressing evidence. Even though all the sentences will likely have already been served, the prospect of a clean criminal record might bring some relief to the victims of southern underlaw.

The Japanese-American *coram nobis* litigation offers a second precedent that is more in line with slave-redress litigation: the use of litigation to correct the historical record of an atrocity. Of the three *coram nobis* petitions filed in the Japanese-American litigation, the *Korematsu* and *Hirabayashi* petitions, filed in San Francisco and Seattle, respectively, resulted in judicial opinions correcting the official record created in the prior cases.[140] In fact, the *Hirabayashi* court of appeals did more than correct the record. It "issued a strongly worded opinion that both condemned the government's litigation strategies during the original internment cases and criticized the government's approach to the *coram nobis* litigation itself."[141] In contrast, the *Yasui coram nobis* petition, filed in a Portland, Oregon federal court, did not elicit a judicial opinion regarding the facts sur-

136. *Id.* at 7-8.
137. *Id.* at 8.
138. *Id.* at 8-9.
139. *Id.* at 8. *See also* RAMSEY CLARK, CRIME IN AMERICA: OBSERVATIONS ON ITS NATURE, CAUSES, PREVENTION AND CONTROL (1970); VICTOR S. NAVASKY, KENNEDY JUSTICE (1971); JACK BASS, UNLIKELY HEROES (1981).
140. *See* Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984); Hirabayashi v. United States, 828 F.2d 591 (9th Cir. 1997).
141. YAMAMOTO, *supra* note 125, at 319. *See Hirabayashi*, 828 F.2d 591.

rounding the events in question.[142] The judge merely vacated Yasui's criminal conviction without commenting on the issue of prosecutorial misconduct.[143] Judge Belloni, in fact, stated:

> I decline to make findings [of fact] forty years after the events took place. There is no case nor controversy since both sides are asking for the same relief but for different reasons. The Petitioner would have the court engage in fact-finding which would have no legal consequences. Courts should not engage in that kind of activity.[144]

Judge Belloni's failure to revise the factual record in the case prompted Yasui to appeal the judge's otherwise favorable decision. Unfortunately, Yasui died before the appeal was decided.

There is an urgent need in today's society to correct the historical record of slavery and its lingering effects. Our Constitution was a pro-slavery Constitution prior to 1860.[145] Slavery played a central role in the socioeconomic development of our country, the benefits of which are still enjoyed today, and slavery laid down racial fault lines, the tremors of which can still be felt today.[146] These lessons need to be taught and incorporated in our lives. Litigation is certainly one means of teaching these lessons, depending on the judge.

C. *Hohri v. United States I and II*

As important as the *coram nobis* litigation was, it was not the Japanese Americans' primary litigation strategy. Their main strategy was to seek redress for all internees, not just those convicted of violating

142. *See* Yasui v. United States, 83-151 BE (D. Or. 1985).

143. *Id. See also*, YAMAMOTO, *supra* note 125, at 318.

144. Judge Belloni's order is reprinted in YAMAMOTO, *supra* note 125, at 318. *See also Yasui*, 83-151 BE.

145. "The U.S. Constitution was designed to protect the rights and security of slaveholders, and between 1792 and 1845 the American political system encouraged and rewarded the expansion of slavery into nine new states." DAVID BRION DAVIS, IN THE IMAGE OF GOD: RELIGION, MORAL VALUES, AND OUR HERITAGE OF SLAVERY 134 (2001). *See also*, DON E. FEHRENBACHER, THE SLAVEHOLDING REPUBLIC: AN ACCOUNT OF THE UNITED STATES GOVERNMENT'S RELATIONS TO SLAVERY (2001). No less than five provisions of the Constitution directly accept and protect slavery. *Article I, Section 2, Paragraph 3* (the "three-fifths clause") counted only three-fifths of a slave in determining a state's population for purposes of congressional representation and any "direct taxes." *Article I, Section 9, Paragraph 1* (the "slave-trade clause") prevented Congress from ending the slave trade before the year 1808, but did not require Congress to ban it after that date. Somewhat redundant of the three-fifths clause, *Article I, Section 9, Paragraph 4* ensured that a slave would be counted three fifths of a white person if a head tax were ever levied. *Article V, Section 2, Paragraph 3* (the "fugitive-slave clause") required the return of fugitive slaves to their owners "on demand," and, finally, *Article V* prohibited Congress from amending the slave-trade clause before 1808. For a discussion of several other constitutional provisions that indirectly recognize slavery see, PAUL FINKELMAN, SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON 3-36 (2nd ed. 2001).

146. *See, e.g.,* DAVIS, IN THE IMAGE OF GOD, *supra* note 145, at 168-169; Mark Alden Branch, *The Slavery Legacy*, YALE ALUMNI MAGAZINE, Feb. 2002, at 34 (quoting interview with Davis).

the wartime curfew and exclusion orders. This objective was effectuated in a lawsuit filed in 1983 by nineteen former internees and a Japanese American organization against the federal government. In this case, *Hohri v. United States,*[147] plaintiffs sought monetary relief for violations of their constitutional rights, loss of homes, businesses, education, and careers, and for physical and psychological injuries, including destruction of family ties and personal stigma, arising from their wartime removal and internment.[148] The judge in this case never reached the merits of plaintiffs' claims. Instead, he dismissed the entire case on procedural grounds.[149] Thus, *Hohri*, not unlike the Japanese and German forced labor cases, is a negative precedent for slave-redress litigation. *Hohri*, in fact, dealt with two questions raised in the forced labor litigation: the statute of limitations and sovereign immunity. *Hohri* ruled against the plaintiffs on both issues.[150]

Unlike many forced labor cases, no choice of law question was presented with respect to the statute of limitations issue in *Hohri.* In the court's ruling, there was no question that the applicable statute of limitations for claims brought against the United States, was section 2401(a) of Title 28 of the United States Code, which states that, except where specially provided elsewhere, "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."[151] In devising this limitations period, Congress, the court noted, attempted to weigh several competing policy considerations—such as the plaintiff's need for a reasonable time within which to present her claim, the defendant's right to be free of stale claims, and the court's interest in preserving evidence (which could become lost due to death or disappearance of witnesses, fading memories, or document destruction or disappearance) for the search of justice.[152] Based upon the six-year statute of limitations, the judge ruled that the right of action on which plaintiffs were suing "accrued" (i.e., the clock began ticking) at the time the underlying incidents occurred during World War II. "Once plaintiff is on inquiry that it has a potential claim, the statute

147. 847 F.2d 779 (Fed. Cir. 1988) (*per curiam* opinion), *aff'g* 586 F. Supp. 769 (D.D.C. 1984) (holding appellants' claims were barred by statute of limitations and sovereign immunity); United States v. Hohri, 482 U.S. 64 (1987) (holding that Federal Circuit rather than the appropriate region court of appeals has jurisdiction in this case); Hohri v. United States, 793 F.2d 304 (D.C. Cir. 1986) (*per curiam* opinion) (request for rehearing *en banc* denied).

148. *Hohri*, 586 F. Supp. at 773.

149. *Hohri*, 847 F.2d at 779.

150. *See generally Id.* Because the *Hohri* plaintiffs were citizens suing their own government, the court's reasoning on the sovereign immunity questions differed from that in the Japanese and German forced labor cases.

151. *Hohri*, 586 F. Supp. at 786 (quoting 28 U.S.C. § 2401(a) and citing cases).

152. *Id.* at 791.

can start to run."[153] Given the absence of fraud or any other reason to delay the start of the statute of limitations in this case, plus the fact that the lawsuit was filed on March 16, 1983, thereby "tolling" (or stopping) the statute well beyond the six-year limitations period, the plaintiffs' lawsuit was time-barred.[154]

The court disposed of the sovereign immunity question with equal ease. To the extent plaintiffs were asserting constitutional, implied-in-law contract, or equitable claims, these claims were barred by the doctrine of sovereign immunity, because Congress has not expressly waived the government's immunity regarding such claims.[155] To the extent plaintiffs were asserting expressed or implied-in-fact contract claims, these claims fell within the Tucker Act's waiver of sovereign immunity for such claims, but were barred by the Tucker Act's six-year statute of limitations.[156]

What about the Federal Tort Claims Act[157] (FTCA)? This Act allows individuals injured by federal government officials or employees in the course of performing their official duties to seek money damages against the federal government in the Court of Claims, after the claims have first been presented and denied by the appropriate federal agencies.[158] The court ruled that any claims asserted under the FTCA's waiver of sovereign immunity were barred by that statute's two-year limitations period.[159] In addition, plaintiffs failed to exhaust their administrative remedies.[160]

After two technical appeals, one reaching the Supreme Court,[161] the Federal Circuit, an appellate court with exclusive jurisdiction over certain cases brought against the federal government,[162] affirmed the trial judge's dismissal of the internment case.[163] The dismissal came in 1988, the year in which President Ronald Reagan signed the Civil Liberties Act that issued a government apology for removal and internment and backed the apology with reparations consisting of, *inter alia*, $20,000 for each former internee and a scholarship fund.[164] The Act forecloses litigation for those who accept statutory reparations.[165] It is

153. *Id.*
154. *Id.* at 791-92.
155. *Id.* at 791.
156. *Id.* at 792.
157. 28 U.S.C. § 1346(b) (2000).
158. *See* 28 U.S.C. §§ 1346(b), 2401(b), 2671-2680 (2000).
159. *Hohri*, 586 F. Supp. at 793.
160. *See id.*
161. *See* United States v. Hohri, 482 U.S. 64 (1987); Hohri v. United States, 793 F.2d 304 (D.C. Cir. 1986).
162. Jurisdiction arises under the Little Tucker Act, 28 U.S.C. § 1346(a)(2) (2000).
163. *Hohri v. United States*, 847 F.2d 779 (Fed. Cir. 1988).
164. *See* Civil Liberties Act of 1988, 50 U.S.C. app. § 1989b (1990).
165. *Id.*

doubtful that *Hohri* inspired the Act in the same way that the dozens of German forced labor cases led to the Foundation Law. Indeed, legislative inquiry into the internment matter began in 1980, well before *Hohri* was filed in 1983.[166] That investigation produced a 1982 report, titled *Personal Justice Denied*, condemning removal and internment. *Personal Justice Denied*, in turn, led to a 1983 report recommending the redress that was eventually authorized under the Civil Liberties Act of 1988.[167]

It is against the backdrop of this litigation—Japanese and Nazi forced labor cases and Japanese-American removal and internment cases—that slave-redress lawsuits have been filed. Most of the slave-redress cases were filed during the 1990s and are still being filed today, with more to come in the future. Lawyers filing slave-redress cases have attempted to learn from the "mistakes" of prior redress litigation. They have largely been unsuccessful, however, because the "mistakes" are structural; that is, they arise from the normal operation of our legal system.

IV. SLAVE-REDRESS LAWSUITS: PUBLIC ACTIONS

A. *Overview*

The first slave redress lawsuits were filed against the federal government.[168] All were dismissed before a decision on the merits could be reached.[169] Not unlike the forced labor and interment cases discussed earlier, these public actions have been dismissed mainly on statute of limitations, sovereign immunity, and nonjusticiability (or political question) grounds.[170] Proponents of the tort model, however, often point to *Pigford v. Glickman*,[171] a case in which the plaintiffs and the federal government reached a settlement, as an example of a "successful" slave-redress lawsuit. But this case, which was greatly aided by an unusual event—Congress passed legislation tolling the statute of limitations governing the plaintiffs' claims[172] —does not fit the profile of a typical redress case, slave or otherwise. Yet, as I shall explain in due course, *Pigford* teaches valuable lessons about the potential dangers

166. *See* REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED (1982).

167. For a thorough discussion, *see* WHEN SORRY ISN'T ENOUGH, *supra* note 1, at 171-200.

168. *See infra* Part IV, subparts B-D.

169. *Id.*

170. *Id.*

171. 182 F.R.D. 341 (D.D.C. 1998), consent decree approved and entered, 185 F.R.D. 82 (1999), reversing district court's order, *inter alia*, extending filing deadlines under consent decree, 292 F.3d 918 (D.C. Cir. 2002).

172. *See Pigford*, 185 F.R.D. at 104.

of class action litigation that could befall "successful" slave-redress litigation.

B. *Johnson v. MacAdoo*

The first attempt to litigate a slave redress claim, or the first to result in a judicial opinion, was filed in 1916. A public action, *Johnson v. MacAdoo*[173] was filed in the Federal District Court of the District of Columbia, a state court, by four blacks against the Secretary of Treasury. Plaintiffs alleged that they and their ancestors were enslaved from 1859 to 1868 and were forced to pick cotton that was subject to taxation under the Internal Revenue Tax and Raw Cotton Act of 1862.[174] Plaintiffs claimed that this revenue, over $60 million, was unpaid wages.[175] Without addressing the merits of this claim, the district court dismissed the complaint, and the court of appeals later affirmed that dismissal, on grounds of sovereign immunity.[176]

C. *Berry v. United States*

The next public action to reach a judgment was *Berry v. United States*,[177] filed in federal court in 1994. This action was filed *pro se* (i.e., the plaintiff represented himself, which is never a good idea) and styled as a class action representing the descendants of slaves.[178] Despite plaintiff's desire to bring this case as a class action,[179] the case had to proceed as an individual action, because a *pro se* plaintiff can represent himself and no other.[180] Plaintiff sought to quiet title to forty acres of United States land located in San Francisco or, in the alternative, $3 million in damages.[181] Subject matter jurisdiction was invoked under Article III of the Constitution, the Thirteenth and Fourteenth Amendments, and the Freedmen's Bureau Act of 1865.[182] Section 4 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."[183] Section 4, it should be noted, was designed to codify Major General Wil-

173. 45 U.S. App. D.C. 440 (1917).
174. *Id.* at 440-41.
175. *Id.*
176. *Id.*
177. No. C-94-0796-DLJ, 1994 WL 374537 (N.D. Cal. July 1, 1994).
178. *Id.* at *1.
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.* at *2.
183. *Id.* at *1 (citing § 4 of the Act of March 3, 1865, ch. 90, 13 Stat. 507).

liam T. Sherman's Special Field Order No. 15 issued on January 16, 1865, three months before § 4 was enacted. This act gave rise to the federal government's unfulfilled promise of "Forty Acres and a Mule."[184]

The request for redress in the form of land is 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.[185] For all the reparations it has 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.[186] On the other hand, the return of land as a form of redress is not unheard of in Western law. South Africa has 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 land to the rightful owners.[187] Though certainly not as extensive as South Africa, the United States has returned land to Native Americans.[188] But plaintiff Mark Berry may have gone too far in asking for forty acres of valuable federal land in San Francisco: the Federal Building, the U.S. Mint Building, and the U.S. Naval Station (Treasure Island). Hedging his bet, plaintiff asked for $3 million in the alternative.[189]

The district court dismissed all claims on procedural grounds, never having reached the merits.[190] Judge Jensen ruled that none of the jurisdictional bases on which plaintiff relied were in fact jurisdictional.[191] 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 plaintiffs' prop-

184. *See Special Field Order No. 15*, *in* WHEN SORRY ISN'T ENOUGH, *supra* note 1, at 365-66.

185. *See, e.g., infra* text accompanying notes 300-05.

186. *See* Greg Steinmetz, *One Family's Battle for Ancestral Land Poses Hard Questions*, WALL ST. J., November 11, 1996, at A1. The more usual remedy is not specific performance but damages. *See* Neal E. Boudette, *Seeking Reparation: A Holocaust Claim Cuts to the Heart of the New Germany*, WALL ST. J., March 29, 2002, at A1.

187. *See* Warren Freedman, The Restitution of Land Rights in South Africa, (June 12-14, 2003) (paper delivered at The 2003 CLEA Conference on "Reparations: Theory, Practice and Legal Education," held at University of Windsor Faculty of Law, Windsor, Ontario, Canada) (on file with author).

188. 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. . . ." *Klamath Tribes May Get Land Back*, SAN DIEGO UNION-TRIBUNE, March 20, 2002, at A6.

189. Berry v. United States, No. C-94-0796-DLJ, 1994 WL 374537, at *2 (N.D. Cal. July 1, 1994).

190. *Id.* at *3.

191. *Id.* at *2.

erty claim.[192] Each, instead, provided a right of action (a legal claim) that required an established jurisdictional base (again, judicial authority to hear a claim) if it was to be heard in federal court.[193] In that regard, Judge Jensen considered two jurisdictional statutes. The first was the Tucker Act,[194] which "confers exclusive subject matter jurisdiction on the Court of Federal Claims for '[a]ny civil action or claim against the United States . . . founded either upon the Constitution, or any Act of Congress' where money damages [do not] exceed $10,000."[195] The phrase "Act of Congress" did not, however, include discontinued statutes like the Freedmen's Bureau Act, which expired on July 17, 1989, after several extensions by Congress. Thus, in addition to the court's lack of subject matter jurisdiction, the plaintiff did not even have a viable right of action based on that Reconstruction Era statute.[196] Furthermore, even if the plaintiff did have a claim under the Freedmen's Bureau Act, it would be barred by the six-year statute of limitations for civil actions against the federal government.[197] 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 have passed since then."[198]

Next, Judge Jensen turned to the Quiet Title Act,[199] which in conjunction with a provision of the Tucker Act,[200] confers jurisdiction on district courts to quiet title to land in which the United States has an interest. The Quiet Title Act was inapplicable in this case, however, because it does not apply to claims that could have been brought under the Tucker Act.[201] And even if the Quiet Title Act was applicable, plaintiff's claim would be time barred by the Act's twelve-year statute of limitations.[202]

Basing a slave-redress claim on the Freedmen's Bureau Act was problematic for another reason. Even if the Act were still in effect, it only covers claims regarding land "within the insurrectionary states" and the payment of rent or a purchase price.[203] Plaintiff claimed title

192. *Id.*
193. *Id.*
194. 28 U.S.C. § 1346(a)(2) (1997).
195. *Id.*
196. *Berry*, 1994 WL 374537 at *2, 3.
197. *Id.* at *3 (citing 28 U.S.C. § 2401(a)).
198. *Id.* at *3.
199. 28 U.S.C. § 2409a (2000).
200. 28 U.S.C. § 1346(f) (2000).
201. *See* 28 U.S.C. § 2409a(a) (2000) (exempting Tucker Act Claims).
202. 28 U.S.C. § 2409a(f) (2000).
203. *Berry*, 1994 WL 374537, at 3.

to land located in California, and did not allege the payment of rents or a purchase price.[204]

In all its discussion of the statute of limitations issue, the court did not consider, as perhaps it should have, the question of whether the applicable statutes 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 inequitable circumstances.[205] 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"?[206] On the other hand, 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 have to reach the question of sovereign immunity. He did, however, comment on the question twice. 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."[207] Second, the judge noted that sovereign immunity was not waived under the *Bivens* doctrine, which creates a constitutional right of action under certain conditions, because that doctrine waives the immunity of federal agents, not the federal government. In fact, the Supreme Court in *Bivens* refused to rule on the question of sovereign immunity.[208]

Finally, Judge Jensen rejected plaintiff's argument that if Japanese Americans and Indian tribes are entitled to redress, so are blacks. Redress in those cases, the judge observed, "was authorized by existing Congressional statutes specifically addressing those topics."[209] The court, in short, could find no procedural basis on which to permit the case to proceed to its merits.

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204. *Id.*

205. 51 AM. JUR. 2D *Limitation of Actions* § 174 (2000).

206. *See* the "Gold Train" case, Rosner v. United States, 2002 U.S. Dist. LEXIS 17632 (S.D. Fla. 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 pro-Nazi Hungarian government during World War II and subsequently seized and sold by the U.S.)

207. *Berry*, 1994 WL 374537, at *2-3 (cases cited therein).

208. *See* Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

209. *Berry*, 1994 WL 374537, at *3 n.4.

D. *Cato v. United States*

Berry was followed one year later by another public action filed, once again, in a California federal court. Like *Berry, Cato v. United States*[210] was brought *pro se.* But unlike *Berry, Cato* reached the federal appellate level, where lawyers took over.[211] The lawyers did no better than their clients, however. Insurmountable procedural barriers overwhelmed the legally adroit and novice alike.

Plaintiffs' complaint sought "compensation of $100,000,000 for forced ancestral indoctrination into a foreign society; kidnapping of ancestors from Africa; forced labor; breakup of families; removal of traditional values; deprivations of freedom; and imposition of oppression, intimidation, miseducation, and lack of information about various aspects of their indigenous character."[212] Plaintiffs also requested that the court "order an acknowledgment of the injustice of slavery in the United States and in the 13 American colonies between 1619 and 1865, as well as of the existence of discrimination against freed slaves and their descendants from the end of the Civil War to the present."[213] In addition, they sought "an apology from the United States."[214]

Both the trial court and the appellate court threw out the complaint. The former did so, on the ground that plaintiffs' allegations did not translate into legally actionable harms or refer to any basis for the exercise of federal jurisdiction. On appeal, counsel for plaintiffs argued that the Thirteenth Amendment provided a right of action against the United States for the harms enumerated in the complaint. Furthermore, the discrimination alleged in the complaint was fresh, it was "continuing." Finally, counsel argued that sovereign immunity does not bar a Thirteenth Amendment action against the federal government, "otherwise, the Thirteenth Amendment's obligation is meaningless."[215] The appellate court rejected each of these arguments on several grounds.

First, it ruled that the plaintiffs lacked standing to assert their constitutional claim, which the court read as a claim "based on the stigmatizing injury to all African Americans caused by racial discrimination."[216] Under the doctrine of standing, the plaintiff must have a tangible, personal injury traceable to the defendant's conduct. "Without a concrete, personal injury that is not abstract and that is

210. 70 F.3d 1103 (9th Cir. 1995).
211. *Id.* at 1105.
212. *Id.* at 1106.
213. *Id.*
214. *Id.*
215. *Id.* at 1110.
216. *Id.* at 1109-10.

fairly traceable to the government conduct that she challenges as unconstitutional, Cato lacks standing," the court said.[217] This claim was also defective, the court ruled, because it "does not trace the presence of discrimination and its harm to the United States."[218] Quite frankly, that was a silly ruling because slavery and legal subordination and stigmatization that followed in its wake would not have been possible without the federal government's complete complicity. Our Constitution created a "slaveholding republic" prior to the Civil War[219] and thereafter, authorized a regime of racial apartheid under the separate-but-equal doctrine. Federal law, in short, mandated and sanctioned racial oppression of blacks in the United States.[220]

Next, the court raised the sovereign immunity question. Its ruling on the question made explicit what Judge Jensen's ruling in *Berry* only implied; namely, the Thirteenth Amendment itself is not a jurisdictional, or "self-enforcing," provision.[221] Unless a Thirteenth Amendment claim can be asserted pursuant to a jurisdictional statute—the grant of jurisdiction carrying with it a waiver of sovereign immunity—the claim is without jurisdiction.[222] The most likely jurisdictional statute for tort actions against the United States, the court noted, is the Federal Torts Claims Act (FTCA).[223] The FTCA vests the Court of Claims with jurisdiction (and, hence, waives sovereign immunity) for tort claims against the federal government so long as those claims accrue on or after January 1, 1945 and are brought within two years after the occurrence.[224] Constitutional tort claims do not, however, fall within the FTCA, the court ruled.[225] But why not, then, use the Tucker Act, which as we saw in *Berry*, applies to constitutional and statutory tort claims against the United States, but not to property claims? The court did not consider this question, but it did note another statute that waives sovereign immunity, namely the Administrative Procedures Act.[226] This Act was inapplicable, the court ruled, because it only applies to lawsuits seeking "other than money damages" whereas plaintiffs were seeking damages.[227]

217. *Id.* at 1109.
218. *Id.* at 1108.
219. *See supra* note 145.
220. *See* generally ROY L. BROOKS, GILBERT PAUL CARRASCO, MICHAEL SELMI, CIVIL RIGHTS LITIGATION: CASES AND PERSPECTIVES (2d ed. 2000).
221. Cato v. United States, 70 F.3rd 1103, 1110-11 (9th Cir. 1995).
222. *Id.*
223. *Id.* at 1110.
224. *Id.* at 1106 (citing 28 U.S.C. § § 1346(b) (FTCA) and 2401(b) (applicable statute of limitations)).
225. *Id.* at 1110-1111.
226. 5 U.S.C. § 702 (2000).
227. *Cato,* at 1111 (citing 5 U.S.C. § 702).

Finally, the court rejected plaintiffs' constitutional claim on nonjusticiability grounds. Similar to application of the political question doctrine in forced labor litigation discussed earlier in this article, the appellate court, agreeing with the district court, ruled that the "legislature, rather than the judiciary, is the appropriate forum for plaintiff's grievances."[228] It is difficult to take the court's nonjusticiability argument seriously given the fact that the federal courts have long been thrown into the political thicket by cases like *Brown v. Board of Education*.[229] The question of school desegregation in the era of Jim Crow was as much a political question as it was a legal or moral one.

E. *Pigford v. Glickman*

After *Berry* and *Cato*, federal courts have not hesitated to dispose of public actions seeking slave redress. The opinions have even become shorter.[230] One putative slave-redress case has, however, managed to survive pretrial dismissal. This case, *Pigford v. Glickman*,[231] was aided by the passage of a statute by Congress tolling the applicable statute of limitations.[232] While, as I shall argue in moment, I do not believe this case fits the profile of slave-redress cases, it does expose the dangers of class action litigation of which anyone considering the soundness of the tort model should be aware.

In 1997, black farmers filed a class action lawsuit in federal court against Dan Glickman, President Clinton's Secretary of Agriculture at that time.[233] The complaint alleged that the United States Department of Agriculture (USDA) systematically discriminated against black farmers in its financial assistance programs for farmers (includ-

228. *Id.* at 1105.

229. 347 U.S. 483 (1954).

230. *See* Bell v. United States, 2001 U.S. Dist. LEXIS 14812 (N.D. Tex. 2001) (*pro se* complaint of incarcerated plaintiff seeking reparations dismissed pursuant to *Cato*); Obadele v. United States, 52 Fed. Cl. 432 (2002) (black plaintiffs not entitled to relief under Civil Liberties Act, which applies to Japanese-American internees).

231. This case has a number of opinions reported at: 182 F.R.D. 341 (D.D.C. 1998) (class certification granted); 185 F.R.D. 82 (D.D.C. 1999) (consent decree approved and entered). Other cases dealing with post-consent decree issues, primarily the misconduct of class counsel "bordering on legal malpractice" to meet critical consent decree deadlines, are reported under the title Pigford v. Veneman, 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). The named defendants in these actions, Dan Glickman and Ann Veneman, were the Secretary of Agriculture under Presidents Clinton and George W. Bush, respectively.

232. *See* Agricultural, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, Pub. L. No. 105-277, § 741, 122 Stat. 2681 (codified at 7 U.S.C. § 2297, Notes) (1999) *cited in* Pigford v. Glickman, 185 F.R.D. 82, 88-89 (1999).

233. *Pigford*, 185 F.R.D. at 82, 89.

ing awarding farm loans) and failed to process claims of racial discrimination filed by black farmers.[234] The action was brought under the Equal Credit Opportunity Act (ECOA),[235] which provides a statutory right of action for claims of discrimination in credit transactions. Section 1331 of title 28 of the United States Code, the general "federal question" statute, gives federal courts subject matter jurisdiction over controversies that arise under federal statutes, such as ECOA.[236] Thus, plaintiffs had a right of action, and the district court had jurisdiction over the right of action. Plaintiffs, therefore, did not face the right-of-action and sovereign-immunity problems that typify public actions for slave-redress.[237] But what about the statute-of-limitations problem?

Actions brought under ECOA have a two-year statute of limitations.[238] The government was poised to raise the defense of statute of limitations as grounds for barring acts of discrimination that took place more than two years prior to the filing of the federal action.[239] Many black farmers filed complaints of discrimination with the USDA in 1983 for acts of discrimination that allegedly occurred as far back as 1982. A report issued in 1997 by the Office of the Inspector General of the USDA concluded that "the USDA had a backlog of complaints of discrimination that had never been processed, investigated or resolved."[240] Thus, black farmers who had waited since 1983 for the USDA to respond to their complaints only learned in 1997 that the USDA had stopped processing them. Yet, as the court noted, "the government would argue that any claim under ECOA was barred by the statute of limitations."[241]

The Inspector General's report and a 1996 report issued by the USDA's Civil Rights Action Team, which concluded that "minority farmers have lost significant amounts of land and potential farm income as a result of discrimination by [the USDA],"[242] helped to convince Congress to pass legislation tolling the two-year statute of limitations. Congress has the power to waive an otherwise valid defense to a claim against the United States for any reason, including in recognition of "its obligation to pay a moral debt."[243] On October 21, 1998, President Clinton signed into law a bill that tolled the statute of

234. *Id.* at 86.
235. 15 U.S.C. § 1691 (2000).
236. 28 U.S.C. § 1331 (2000).
237. *See Pigford,* at 86.
238. *See* 15 U.S.C. § 1691e(f) (2000); *Pigford,* 185 F.R.D. at 82, 88.
239. *Pigford,* 185 F.R.D. at 88.
240. *Id.*
241. *Id.*
242. *Id.* (quoting the report).
243. United States v. Sioux Nation of Indians, 448 U.S. 371, 397-398 (1980).

limitations for all discrimination complaints filed with the USDA before July 1, 1997 (the year in which the *Pigford* complaint was filed) alleging acts of discrimination that took place between January 1, 1981 and December 31, 1996.[244] With right of action, jurisdictional, and statute of limitations questions resolved in their favor, plaintiffs had crossed significant procedural barriers. The case could now proceed to the merits.

But the case never got that far. Two procedural matters ended the case in plaintiffs' favor. First, the case was certified as a class action, twice in fact: as a "(b)(2)" class action—wherein class remedies are primarily limited to injunctive or declaratory relief—and then, the court vacating the prior certification order, as a "(b)(3)" class action—wherein class remedies can include monetary relief. As a "(b)(3)" class action, the membership was limited to black farmers who "farmed or attempted to farm between January 1, 1981, and December 31, 1996"; applied to the USDA for farm credit and believed they were the victims of USDA discrimination during this time; and "filed a discrimination complaint on or before July 1, 1997."[245] Second, the case was settled. By mid-November of 1997, after the Inspector General's February 1997 report, the government had rethought its original opposition to the lawsuit and began settlement negotiations.[246]

Some proponents of the tort model have embraced *Pigford* as a successful slave-redress lawsuit. Even Judge Freedman, who approved the settlement agreement, saw the case in this light. He concluded his opinion, in rather dramatic fashion, with the following statements:

> Forty acres and a mule. The government broke that promise to African American farmers. Over one hundred years later, the USDA broke its promise to Mr. James Beverly [one of the original plaintiffs]. It promised him a loan to build farrowing houses so that he could breed hogs. Because he was African American, he never received that loan. He lost his farm because of the loan that never was. Nothing can completely undo the discrimination of the past or restore lost land or lost opportunities to Mr. Beverly or to all of the other African American farmers whose representatives come before this Court. Historical discrimination cannot be undone.[247]

Pigford is not, in my view, a true slave-redress lawsuit. It is, instead, a traditional civil rights lawsuit. Neither the complaint nor the court's approval of the settlement was based on the lingering effects of slav-

244. *See* Agricultural, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, Pub. L. No. 105-277, § 741, 122 Stat. 2681 (codified as 7 U.S.C. § 2297, Notes) (1999).

245. *Pigford*, 185 F.R.D. at 92.

246. *See id.* at 88, 89.

247. *Id.* at 112.

ery or Jim Crow. The claims sued upon only dated back to 1981. Though the claims relate or connect to slavery and Jim Crow, the plaintiffs did not rely upon that connection, and, indeed, did not have to in order to win. The lawsuit targeted present-day discrimination—discrimination that was active rather than passive, fresh rather than old.

In contrast, slave-redress cases target the present-day manifestations of past atrocities. These cases are about the lingering effects of past discrimination. The cause of the discrimination on which the plaintiffs sue is in the past, not the present. They seek a judicial decree based on a connection between the present and slavery or Jim Crow, or they simply target an event that took place during slavery or Jim Crow, usually the latter as in the case of the Tulsa lawsuit, *Alexander v. Governor of Oklahoma*,[248] discussed next. Thus, slave redress lawsuits are about the past atrocities of slavery and Jim Crow. Acts of current discrimination, or active discrimination, may be at issue as well, but the case is not about those acts. *Slave redress cases succeed because of their connection to the past, not in spite of that connection.*

It is because of this focus on the past that slave redress cases acquire their special difficulties. The absence of a well-established claim, the want of subject matter jurisdiction, the running of applicable statutes of limitations, and the problem of justiciability converge on slave redress litigation sometimes all at once. The typical slave redress lawsuit, in short, faces procedural barriers that were not present in *Pigford*. Indeed, the procedural posture of the case was very different from cases like *Berry* and *Cato* as well as the forced labor and interment cases.

Yet, *Pigford* is not totally irrelevant to the tort model. It offers valuable lessons for the lawyers who are or will be pursuing that strategy for slave redress. These lessons concern the lawyers' post-settlement conduct. After negotiating what appeared to be a reasonable settlement on behalf of their clients, the lawyers managed to snatch victory away from many members of the class.[249] They persistently failed to

248. 2004 U.S. Dist. LEXIS 5131 (N.D. Okla. March 19, 2004), *aff'd* 382 F.3d 1206 (10th Cir. 2004), *rehearing denied*, 391 F.3d 1155 (10th Cir. 2004), *cert. filed* 2005 WL 562193 (U.S. March 9, 2005).

249. Under the terms of the court-approved settlement, farmers were given two options known as Track A and Track B. Track A required the farmer to provide something more than a "mere scintilla" of proof that he applied for and was denied USDA credit assistance or other benefits between 1981 and 1996. The minimal standard of proof was in recognition of the fact that most class members "had little in the way of documentation or proof" of discriminatory treatment or damages. Track A awards were capped at $50,000 plus forgiveness of certain USDA loans. Although most of the farmers opted for Track A, as of July 2002 "just under 13,000 farmers have been approved for Track A payments, and about 8,500 have had their claims rejected." Allen G. Breed, *Black Farmers Still Fighting for Settlement 4 Years Ago: The Government Has Rejected 40% of the Claims*, TELEGRAPH HERALD (Dubuque, Iowa), September 1,

meet filing deadlines for obtaining payments and filed no more than "a small fraction of the total petitions requested by the farmers."[250]

Thus, the court was deeply concerned about what it termed "the farmers' . . . betrayal . . . by their own lawyers."[251] Farmers like James Beverly, one of the original plaintiffs whom District Court Judge Friedman mentioned by name in his opinion, have paid a heavy price for their lawyers' lapses. Beverly has been waiting for 20 years for a government loan so that he could refurbish his pig-breeding farm.[252] Dealing with career USDA employees who were part of the original problem of discrimination, and now with greedy or incompetent lawyers, Beverly, like other black farmers, felt he had returned to square one.[253] As regards the quality of the legal representation provided by his lawyers, Beverly said it best: "They beat their chests about 'this is the largest civil-rights settlement in the history of the United States.' That's an outright lie."[254]

Pigford, then, offers valuable lessons for the proponents of the tort model. These lessons have less to do with pointing the way to successful litigation—again, *Pigford* lacks the procedural complications of slave-redress cases—than with highlighting the dangers of unethical or incompetent representation too often associated with class actions.[255]

F. *Alexander v. Governor of Oklahoma*

Perhaps the most intriguing public-action case filed to date, *Alexander v. Governor of Oklahoma*[256] was the only public action filed

2002, at A7. Track B imposed no cap on damages, but required farmers, after limited discovery, to prove their claims (that they were treated differently from a "similarly situated" white farmer), by a preponderance of evidence in one-day mini-trials before an arbitrator. Track B imposes strict timeframes for filing, processing, trying, and reviewing claims. As of July 2002, the USDA has settled 58 Track B claims. Awards were given in 35 cases, of which 31 were appealed by the government. The highest amount paid to a Track B claimant was $780,000. The lowest amount was $7,500. Attorneys for the farmers estimate that as of July, 2002, the government has paid out "more than $1 billion" to Track A and B claimants, "plus fees for lawyers and administrators and other costs." *Id.*

250. Pigford v. Veneman, 292 F.3d 918, 921 (D.D.C. 2002) (For the sordid details of the attorneys' misconduct, which one trial judge described as "bordering on legal malpractice" *see Id.* at 921-22.).

251. *Id.* at 927.

252. Breed, *supra* note 249, at A7.

253. Breed, *supra* note 249, at A7.

254. Breed, *supra* note 249, at A7. *See also* Neely Tucker, *A Long Road of Broken Promises for Black Farmers; USDA Fights Claims After Landmark Deal*, WASH. POST, August 13, 2002, at A1.

255. *See, e.g.*, Saylor v. Lindsley, 456 F.2d 896 (2d Cir. 1972); LESTER BRICKMAN, ANATOMY OF A MADISON COUNTY (ILLINOIS) CLASS ACTION: A STUDY OF PATHOLOGY, CIVIL JUSTICE REPORT (2002).

256. Alexander v. Governor of Oklahoma, 2004 U.S. Dist. LEXIS 5131 (N.D. Okla. March 19, 2004), *aff'd* 382 F.3d 1206 (10th Cir. 2004), *rehearing denied*, 391 F.3d 1155 (10th Cir. 2004), *cert. filed* 2005 WL 562193 (U.S. March 9, 2005).

against a state rather than the federal government. Also, it is the only slave-redress case that targets events that took place during Jim Crow rather than slavery. The complaint was written on behalf of dozens of blacks who survived one of the worse race riots in the history of our country: the Tulsa Race Riot of 1921.[257]

The riot was sparked on May 30, 1921, when a nineteen-year-old black male named Richard Rowland entered the elevator at the Drexel Building in downtown Tulsa to deliver a package. He stumbled against a white female elevator operator named Sara Page, who screamed for help. When Rowland ran from the building, Page screamed attempted rape.[258] Arrested later that day, Rowland proclaimed his innocence, and explained to the authorities that he became frightened and ran when Page screamed, knowing that many blacks had been lynched on false charges of raping white women.[259] Rumors began to fly when the *Tulsa Tribune* published an outrageously inaccurate article, titled "Nab Negro for Attacking Girl in an Elevator," that reported Rowland tore Page's dress, scratched her face, and touched her hand. A white lynch mob began to gather outside of the jail. News of the lynch mob traveled to the all-black section of Tulsa, called "Greenwood." Fearing for Rowland's safety, a group of some thirty black men armed themselves and proceeded to the jail. Many of them were World War I veterans who had fought in Europe.[260] They were confronted by a white crowd as they arrived at the jail. The riot began when a black World War I veteran refused to surrender his weapon to the white crowd. Fighting escalated over several days as more and more people from both races joined in. As the outnumbered blacks retreated into the Greenwood district, whites began to destroy property as well as lives. In the process, they inflicted between $2 to $3 million in property damage as 18,000 black homes and businesses were burned, and another 304 black homes were looted. When the riot finally subsided, 4,241 blacks were left homeless and 300 were dead.[261]

257. Alexander v. Governor of Oklahoma, Docket No. 03cv00133 (N.D. Okl. filed February 24, 2003), at Plaintiffs' First Amended Complaint ¶¶ 2-10, 17-18.

258. ROY L. BROOKS, INTEGRATION OR SEPARATION? A STRATEGY FOR RACIAL EQUALITY 271 (1996) (citing sources) [hereinafter INTEGRATION OR SEPARATION?].

259. *Id.*

260. *Id.* at 271-72. *See also Alexander*, Docket No. 03cv00133, at Plaintiffs' First Amended Complaint ¶¶ 17, 433-34, 437-38.

261. INTEGRATION OR SEPARATION?, *supra* note 259, at 270-73. *See also Alexander*, Docket No. 03cv00133, at Plaintiffs' First Amended Complaint ¶¶ 2-10, 17, 449, 455-56, 469, 479, 481, 484-86, 497, 499; ALFRED BROPHY, RECONSTRUCTING THE DREAMLAND: THE TULSA RIOT OF 1921 (2002).

Plaintiffs in *Alexander* resided in Greenwood at the time of the riot. At the time of the lawsuit, most lived in other states.[262] The complaint alleged that the State of Oklahoma, the City of Tulsa, the Office of the Chief of Police of Tulsa, and other unnamed defendants, acting under local or state authority, "terrorized" plaintiffs, denying them liberty and property without due process, equal protection of the laws, the right to petition government, and several statutory and common law rights, including wrongful death of loved ones.[263] One of the more compelling allegations was that, "the City of Tulsa summarily denied the restitution claims made by every black resident of Greenwood, but allowed restitution claims made by whites."[264] Plaintiffs claimed rights of actions under the First, Thirteenth, and Fourteenth Amendment to the Constitution of the United States, the Civil Rights Act of April 9, 1866 (known as a "§1981 cause of action"), and the Civil Rights Act of April 20, 1871 (which provides two causes of action, "§§ 1983 and 1985(3)").[265] Common law rights of actions for replevin, forcible entry and detainer, wrongful death, false arrest, and involuntary servitude were also alleged. These claims were certainly cognizable under most of the laws invoked in the complaint, and jurisdiction seemed sustainable pursuant to a number of federal statutes.[266] However, questions regarding sovereign immunity with respect to the claim against the state and statute of limitations remained. Indeed, the case was ultimately dismissed on statute of limitations grounds, notwithstanding the fact that the complaint stated a number of allegations in support of an equitable tolling of the applicable statute of limitations, including the following quote from the Oklahoma Commission to Study the Tulsa Race Riot of 1921: "'Before there was this commission, much . . . [of the evidence] was buried somewhere, lost somewhere, or somewhere undiscovered.'"[267]

Alexander offered the best chance for a public law victory under the tort model. By targeting Jim Crow, the plaintiffs substantially reduced the distance between themselves and the wrongful acts. Both plaintiffs and defendants (through their respective offices) were living, the rights of action were cognizable under existing law, and subject matter jurisdiction was not in doubt. No other slave-redress case has these attributes. Not even the private actions.

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262. *Alexander*, Docket No. 03cv00133, at Plaintiffs' First Amended Complaint ¶¶ 38-416.
263. *Id.* ¶¶ 518-551.
264. *Id.* ¶ 509d.
265. 42 U.S.C. §1981 (2000).
266. *See, e.g.*, 28 U.S.C. §§1331, 1343, and 1367 (2000).
267. *Alexander*, Docket No. 03cv00133 at Plaintiffs' First Amended Complaint ¶ 504 (citing Commission report p. 8). *See* Alexander v. Governor of Oklahoma, 2004 U.S. Dist. LEXIS 5131 (N.D. Okla. March 19, 2004), *aff'd* 382 F.3d 1206 (10th Cir. 2004), *rehearing denied*, 391 F.3d 1155 (10th Cir. 2004), *cert. filed* 2005 WL 562193 (U.S. March 9, 2005).

V. SLAVE-REDRESS LAWSUITS: PRIVATE ACTIONS

A. *Synthesis of Cases*

Rather than face formidable procedural hurdles in suing the government, particularly the federal government, blacks have devised a new litigation strategy in the 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 Fleet Boston Financial Corporation), investment banks (such as J.P. Morgan Chase & Co., Lehman Brothers Holdings, Inc., and Brown Brothers Harriman), tobacco 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.).[268] These and other corporate defendants not yet named are alleged to be successors-in-interest to predecessor 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.

These cases, most of which have been consolidated,[269] are typically brought as class actions on behalf of an African-American plaintiff and all other "African-American slave descendants . . . whose ancestors were enslaved in the agricultural industry."[270] Basically, the cases allege that, "Defendants, through their predecessors in interest, conspired and/or aided and abetted with slave traders, with each other and other entities and institutions . . . and other unnamed entities and/or financial institutions to commit and/or knowingly facilitate crimes against humanity, and to further illicitly profit from slave labor."[271] Theses allegation have given rise to legal claims based primarily on customary international law and Anglo-American common law—*lex non scripto* (the unwritten law). Among the crimes against humanity under international human rights law are violations of the right to be free of torture, rape, starvation, physical and mental abuse, summary execution, and forced labor.[272] Common law claims include *quantum*

268. *See In re* African-American Slave Descendants Litigation, 304 F. Supp. 2d 1027 (N.D. Ill. 2004).

269. *See id.*

270. *See, e.g.*, Farmer-Paellmann v. FleetBoston Fin. Corp., C.A. No. 1:02-1862, (E.D.N.Y. 2002), at Complaint ¶¶ 25, 26. (Jury trial demanded.). *See also In re* African-American Slave Descendants Litigation, 304 F. Supp. 2d 1027 (N.D. Ill. 2004), at 1033.

271. *In re* African-American Slave Descendants Litigation, 304 F. Supp. 2d at 1041-42.

272. The best discussion I have seen of 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

meruit, conversion, and unjust enrichment. Thus, the essential claim is that even though slavery may have been legal as a matter of *lex scripto* (the written law), slavery, or some aspects of it, was illegal as a matter of *lex non scripto*, domestic as well as international law.[273]

The defendants in *In re African-American Slave Descendants Litigation* filed four motions, arguing that the complaint should be dismissed because: "(1) Plaintiffs' claims fall short of both constitutional and prudential standing requirements; (2) Plaintiffs' claims present a non-justiciable political question; (3) Plaintiffs' claims fail to state any cognizable claim; and (4) all of Plaintiffs' claims are time-barred."[274] As to the first motion, the court ruled that plaintiffs lacked standing on constitutional grounds because although "standing can be supported by a very slender reed of injury,"[275] that "'slender reed' must still have its roots in the soil of an injury personal to the Plaintiffs, not a 'derivative harm' uprooted from the soil of another's injury."[276] In addition, the court ruled that plaintiffs lacked standing based on prudential limitations placed on the exercise of federal jurisdiction, because "plaintiffs impermissibly attempt[ed] to assert the legal rights of absent third parties"[277]—namely, the dead slaves—and because "plaintiffs impermissibly attempt[ed] to litigate a generalized grievance which is best addressed in the representative branches."[278] The court granted the remaining three motions on the basis of the political question doctrine,[279] the complaint's failure to state a claim upon which relief could be granted,[280] and the statute of limitations.[281]

B. *Innovative Legal Theories for Private Actions*

1. Attacking the "Excesses" of Slavery

Attacking slavery head-on may seem questionable given what is generally believed to have been the legal status of blacks during slavery. The Chief Justice of the United States Supreme Court, Roger Taney, purported to summarize the latter when, in 1857, he wrote that even emancipated blacks were "beings of an inferior order, and altogether unfit to associate with the white race, either in social or politi-

notion of *jus gentium* (or law of nations), is an unnamed student note. *See American Slavery and the Conflicts of Laws*, 71 COLUM. L. REV. 74 (1971).

273. *See In re* African-American Slave Descendants Litigation, 304 F. Supp. 2d at 1042-44.

274. *Id.* at 1044.

275. *Id.* at 1051 (citing 13 CHARLES ALLEN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3531.4 (2d ed. 1984)).

276. *Id.*

277. *Id.* at 1052.

278. *Id.* at 1053.

279. *Id.* at 1054-63.

280. *Id.* at 1063-65.

281. *Id.* at 1065-75.

cal relations; and so far inferior that they had no rights which the white man was bound to respect."[282] As a generalization about the legal rights of blacks 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."[283] Quite simply, free blacks and slaves alike had rights at the state level (codified as well as common law) which the white man *was* bound by law to respect.[284] The problem, of course, is to determine what these rights were and whether they provide a right of action. Some scholars suggest that there was enough uncertainty about the legal rights of blacks—"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"[285] —that a judge looking at this body of law today and of a mind to uphold slave redress could find sufficient ground for doing so. It may be, for example, that human bondage was legal under both international law and domestic common law, but not necessarily the *excesses* of slavery as practiced on many plantations; such as working slaves to death, torture, rape, or malicious murder.

What we may need today is a judge (or judges) who can exhibit the capacity of Chief Justice Marshall, whom many rank as our greatest Supreme Court Justice ever. Marshall exhibited, some say, the capacity "for giving a veneer of reasoned inevitability to a tortuous logical path" in the interest of justice and fairness.[286] An example of this judicial technique can be seen in the context of slavery in Judge Leonard Henderson, who sat on the North Carolina Supreme Court during the antebellum period, serving as its Chief Justice from 1829 to 1833. Using some rather dubious legal footwork along with analysis that augured judicial restraint, Judge Henderson extended the common law of England, which protected the freedom of blacks so long as they remained in England, to sustain the conviction of a white man for murdering a slave.[287] The crime was actionable under the common law, but not expressly under the state statutory law. To make sure the murderer got his just deserts, Judge Henderson ruled that absent a controlling statute, the common law itself protected the slave not from slavery, but from his master:

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282. Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 408 (1857).

283. A.E. Keir Nash, *A More Equitable Past? Southern Supreme Courts and the Protection of the Antebellum Negro*, 48 N.C. L. REV. 197, 201 (1970).

284. *See id.* for a detailed discussion.

285. *Id.* at 202.

286. *Id.* at 208. The reference is to Justice Marshall's signature opinion in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803), in which, through clever legal footwork, he discovers the doctrine of judicial review in the Constitution.

287. *See* State v. Reed, 9 N.C. (2 Hawks) 454, 455-57 (1823).

> 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.[288]

Just six months later, the North Carolina Supreme Court extended the common law to protect the slave from assault and battery by whites other than his master.[289] Thus, Chief Justice Taney was 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.

2. Frontal Attack on Slavery

a. Restitutionary Claim for Gains-Based Unjust Enrichment

Rather than attacking the excesses of slavery, it may be possible to lodge a frontal attack on the institution of slavery itself using common-law doctrine. Some legal scholars in the field of remedies have argued that there is ample space within the palace of justice to accommodate these cases without having to add on additional rooms. Anthony Sebok, for example, argues that the doctrine of unjust enrichment (discussed earlier in the context of the forced labor litigation) is "viable" against corporate defendants.[290] 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[291] (although let us not forget the paper shedding 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."[292] Second, styled as a lawsuit that seeks redress for the wrongful gains held by the perpetrator—what is called a "gain-based lawsuit" as opposed to a "harm-based lawsuit," which focuses on the harms sustained by the victim as a result of the perpetrator's acts—a private action

288. *See id.* at 456. For a different reading of the opinion, *see* Nash, *supra* note 283, at 209.

289. *See* State v. Hale, 9 N.C (2 Hawks) 582 (1823).

290. Anthony J. Sebok, *Prosaic Justice*, LEGAL AFFAIRS, Sept./Oct. 2002, at 52 [hereinafter *Prosaic Justice*].

291. *Id.*

292. *Id.*

against a corporate defendant provides a cognizable right of action under the law of restitution.[293]

b. The Commodification Question

Though there are common-law precedents that 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*,[294] that, "Defendants upon the circumstances of the case are obliged by the ties of natural justice in equity to refund the money represented by the intangible thing they took."[295] Another restitution scholar, Hanoch Dagan cites others.[296] Sebok raises an important moral issue, which could be called the "commodification question."[297] The equitable theory of unjust enrichment, Sebok argues, commodifies the wrongs of slavery, essentially a human rights matter, because it necessarily entails the use of "the quotidian language of property and restitution law."[298] 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.[299]

Dagan answers the commodification question, or what some have called the "blood money" issue,[300] 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.[301] Restitution in private law actions vindicates the victim's

293. *Id.* at 51. *See also* Anthony J. Sebok, *The Brooklyn Slavery Class Action: More Than Just a Political Gambit* at http://www.writ.news.findlaw.com/sebok/20020409.html (available April 9, 2002).

294. 97 Eng. Rep. 676 (K.B. 1760).

295. *Id.* at 681.

296. Hanoch Dagan, The Law and Ethics of Restitution 42 (draft of December 30, 2002) (unpublished chapter, on file with author).

297. *Prosaic Justice*, *supra* note 290, at 51.

298. *Prosaic Justice*, *supra* note 290, at 51.

299. Dagan, *supra* note 296, at 41 (quoting Sebok).

300. *See* ROY L. BROOKS, *The Age of Apology*, in WHEN SORRY ISN'T ENOUGH, *supra* note 1, at 6.

301. Dagan, *supra* note 296, at 41.

right to be free from wrongful interference with her inalienable right to control her labor—whom she shall work for and under what conditions. "Denying restitution for the wrongful appropriation of human labor" in the context of slavery, Dagan asserts, "would not elevate human labor above the marketplace, but rather [would] shift the entitlement to its beneficial use [from] the wrongful appropriator."[302]

c. The Correlativity Thesis

Moreover, given the correlative relationship between legal rights and legal 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."[303] Remedies concretize rights; they make rights meaningful. If the law were to allow the perpetrator of an atrocity to retain his ill-gotten gains, that would not only stand as a "sequel" to the atrocity and, in the case of slavery, the corrupt laws that made the atrocity possible, but it would also stand as their "present embodiment."[304] Thus, finding a recovery in law for slavery provides "a credibility check" on the "integrity and moral significance" of the extant law.[305]

d. The Good Faith Purchaser Doctrine

But what about the fact that slave descendants are not the direct victims of slavery, and the fact that the law has a "good faith purchaser doctrine" that cuts off intergenerational claims? As to the first question, Dagan provides an easy answer: "I do not think that this difficulty should block the suit of the slave descendants. The inheritability of the right to gain-based recovery has been recognized . . . in another context that involves an entitlement of the incomplete commodification type, namely: the right of publicity."[306] 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."[307] 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

302. Dagan, *supra* note 296 at 43.
303. Dagan, *supra* note 296, at 43.
304. Dagan, *supra* note 296, at 43.
305. Dagan, *supra* note 296, at 44.
306. Dagan, *supra* note 296, at 46 n. 156 (sources cited therein).
307. Dagan, *supra* note 296, at 48-49.

the original owner" (or in the case of slavery, the slave descendant).[308] 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.[309] Someone who inherits an ill-gotten asset has put less value into the asset than a person who has purchased the asset, even though both may value the asset equally.[310]

Dagan argues that it is easier to balance the competing hardships in favor of slave descendants than corporate defendants in private law actions because the latter are "direct recipient[s] of wrongful gains from slavery."[311] 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."[312] In contrast, most owners of slave assets (whether land or the slave-labor benefits) are typically unaware of the fact that they own tainted assets.[313] They, therefore, would likely be able to successfully use the good faith purchaser doctrine.[314] 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 and wealthy white families 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." The choice of defendant was not, in short, "opportunistic and morally arbitrary."[315]

e. New Technologies and the Statute of Limitations

Finally, Sebok argues that the statute of limitations, an important procedural barrier in private actions, may be subject to equitable tolling on the ground that new technologies have given plaintiffs a first time opportunity to discover the defendant corporations' unjust gains.[316] If this argument works in private actions, it is difficult to see why it would not work in public actions as well.

Yet, Dagan, while citing a number of rules that prevent the limitations period from accruing—such as, where the gain was fraudulently

308. Dagan, *supra* note 296, at 49-50. *See also* 77 AM. JUR. 2D *Vendor and Purchaser* §§ 425, 426 (2000).
309. Dagan, *supra* note 296, at 50.
310. Dagan, *supra* note 296, at 50.
311. Dagan, *supra* note 296, at 51.
312. Dagan, *supra* note 296, at 51.
313. *See* Dagan, *supra* note 296, at 50.
314. *See* Dagan, *supra* note 296, at 49-51.
315. Dagan, *supra* note 296, at 47, 50.
316. *See Prosaic Justice*, *supra* note 290 at 51. The new technology allegation is contained in many private-action complaints. *See, e.g.*, Farmer-Paellmann v. FleetBoston Fin. Corp., C.A. No. 1:02-1862 (E.D.N.Y. 2002) at complaint ¶¶ 45, 46.

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 extended—such as where "justice demands, which usually requires an element of [further] wrongdoing by the defendant"—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."[317]

On the whole, both Sebok and Dagan, demonstrate that there are many creative ways in which a court may be able to sustain private actions against corporations. I see them proceeding from a very appealing normative stance—to wit, if the slave descendants' claims are morally compelling, then they *must* be cognizable under U.S. law. Otherwise, the extant law stands as the "present embodiment" of America's worst atrocity and the corrupt laws that made it possible.[318] The slave redress cases, then, present a credibility check on our legal system no less important than the Supreme Court's landmark school desegregation case, *Brown v. Board of Education*.[319]

VI. CONCLUSION

Private actions and public actions have to jump considerable procedural hurdles under existing American law. There are, however, creative ways in which a court might be able to sustain private actions against corporations. Common law theories that attack particular excesses of slavery may provide a viable cause 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 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.

As a normative proposition, I would argue that the United States' system of adjudication should embrace claims for slave redress as a means of responding to the needs of its African-American citizens. In the aftermath of *Brown*, "it is now commonplace to say that the [United States'] legal system is an instrument as well as a product of

317. Dagan, *supra* note 296, at 47, 47 n.162. Dagan cites as a possible precedent in support of plaintiffs, Bonder v. Banque Paribas, 114 F. Supp. 2d 117, 134-135 (E.D.N.Y. 2000).

318. *See* Dagan, *supra* note 296, at 43.

319. 347 U.S. 483 (1954).

social change."[320] Courts must relax the procedural barriers so that slave-redress cases can be decided on the merits rather than on the basis of technicalities. Otherwise, the American law stands as the "present embodiment" of America's worst atrocity and the corrupt laws that made it possible

There also needs to be change on the substantive side. The quality of justice must be satisfying to both sides of a dispute. For this to happen, courts must dispense what Thane Rosenbaum calls "moral justice," and not "legal justice."[321] The latter, which describes our legal system today, is more about retribution and punishment rather than about healing, atonement, and repair. Moral justice provides a more spiritually based system of justice, one that allows for respect and dignity. This type of justice would give slave descendants their day in court so that they and, indeed, all Americans, can learn the truth about the atrocity of slavery and better understand the lingering effects of that atrocity. Moral justice would not allow truth to be held hostage to legal technicalities or substantive formalities. It would allow for apologetic discourse and remedies in American law as such exists in other legal systems.[322] Apology is well-suited for atrocities like slavery and Jim Crow because the resultant harms cannot be reduced to monetary value, the primary legal remedy in our legal system. An apology from the perpetrator of an atrocity can be more therapeutic than mere "blood money."[323]

So the problem slave-redress cases face has less to do with the cases themselves than with structural defects in our legal system. Our courts operate under a retributive model of justice—"legal justice"—rather than a restorative model of justice— "moral justice." Hence, we need a system of justice that will help to repair or restore the moral value of the relationship between the perpetrator and the current victims of slavery. The argument I am making obviously goes beyond slave-redress litigation; it applies to civil litigation in general. It is, at bottom, about allowing lawyers to be Atticus Finch or Thurgood Marshall—the lawyers they hoped to be when they went to law school.

320. Carl A. Auerbach, *The Relation of Legal Systems to Social Change*, 1980 WIS. L. REV. 1227, 1227 (1980).

321. *See* THANE ROSENBAUM, THE MYTH OF MORAL JUSTICE: WHY OUR LEGAL SYSTEM FAILS TO DO WHAT'S RIGHT (2004).

322. Roman-Dutch law, which governs such countries as South Africa and Zimbabwe, contains the form of action, or writ, of *actio injuriarum* (the so-called "dignity writ"), which redresses wrongs to "personality." This writ incorporates harms to reputation, integrity, privacy as well as dignity. Remedies available under the writ include apology and "'sentimental' or 'exemplary' damages to serve as a 'solace to injured feelings' for past wrongs."Michael Garcia Bochenek, *Compensation for Human Rights Abuses in Zimbabwe*, 26 COLUM. HUM. RTS. L. REV. 483, 501 (1995).

323. *See* ROY L. BROOKS, *The Age of Apology*, *in* WHEN SORRY ISN'T ENOUGH, *supra* note 1, at 4 & 6.