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# RECONCEIVING REPARATIONS: MULTIPLE STRATEGIES IN THE REPARATIONS DEBATE

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**Abstract:** Much of the current debate over African-American reparations is characterized by a posture of confrontation and demand, and is exemplified in the law by seeking redress using the doctrines of tort and unjust enrichment. This confrontational posture presents a variety of legal, political, and ethical problems for reparations advocates, and has alienated potential allies from the reparations movement. This Article examines and exposes the confrontation model's shortcomings, proposing as an alternative a "conversational" model for reparations debate and advocacy. The conversational framework is not only a superior litigation strategy that more closely approximates traditional civil rights litigation, it also embraces the complexity of the current debate on race, permitting the nation to engage in a more inclusive discussion of the future of race in America.

*[N]othing is more freighted with meaning for our own destiny than the revolution of the Negro American. In far too many ways American Negroes have been another nation: deprived of freedom, crippled by hatred, the doors of opportunity closed to hope. In our time change has come to this Nation, too. The American Negro, acting with impressive restraint, has peacefully protested and marched, entered the courtrooms and the seats of government, demanding a justice that has long been denied. The voice of the Negro was the call to action. But it is a tribute to America that, once aroused, the courts and the Congress, the President and most of the people, have been the allies of progress.<sup>1</sup>*

## INTRODUCTION

At the heart of the reparations debate are the issues of accounting and reckoning: the first seeks to trace our mutual obligations to

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<sup>1</sup> President Lyndon B. Johnson, To Fulfill These Rights, Commencement Address at Howard University (June 4, 1965), at <http://usinfo.state.gov/usa/civilrights/S060465.htm>.

each other as fellow citizens and fellow humans; the second attempts to determine how we are to act upon these obligations. The “reckoning” strand of reparations has a broad sweep: it implicates the issue of how we are to participate in our national life together, particularly through our national institutions. Put simply, reparations arguments demand that we account for and acknowledge the fact that our nation’s institutions were founded upon discrimination. So understood, reparations does not predetermine what such acknowledgement requires, but recognizes that it will vary with each accounting for the wrong done. In this way, reparations is conceived of as a means of engaging in a national dialogue about race that is not limited to “preaching to the choir” but attempts to engage with the complexity of racial interrelation in modern America.

Popularly, arguments for reparations for African Americans are characterized by two related features: confrontation and demand. Confrontational reparations arguments are exemplified by the rallying cry of the Millions for Reparations March in Washington D.C. last year: “They owe us.”<sup>2</sup> Such arguments are generally regarded as tied to a demand for monetary payments from whites to blacks for wrongs suffered as a result of slavery. As a result, reparations has been characterized as a racist, divisive attack on white America, where blacks-as-victims attempt to create a nation within a nation in hopes of a payout for wrongs inflicted over a century-and-a-half ago.<sup>3</sup>

The current confrontational posture of many reparations advocates and litigators is, therefore, deeply problematic. Presented purely as confrontation, reparations suffers from disabling political and ethical problems and alienates large numbers of potential allies, including liberals and members of the black community.<sup>4</sup> As manifested in a

<sup>2</sup> Chris L. Jenkins & Hamil R. Harris, *Descendants of Slaves Rally for Reparations: Organizers Call Event Milestone in Movement*, WASH. POST, Aug. 18, 2002, at C1.

<sup>3</sup> See, e.g., David Horowitz, *Ten Reasons Why Reparations for Blacks is a Bad Idea for Blacks – and Racist, Too!* (Mar. 12, 2001) (controversial anti-reparations advertisement), at [http://www.adversity.net/reparations/anti\\_reparations\\_ad.htm](http://www.adversity.net/reparations/anti_reparations_ad.htm).

<sup>4</sup> For example, a recent study showed that while 79% of blacks supported a governmental apology to African Americans, only 20% of whites did. Harbour Fraser Hodder, *Riven by Reparations: The Price of Slavery*, HARV. MAG., May/June 2003, at 12, 13. When it comes to monetary reparations to slave descendants, two-thirds of blacks favored the idea, against a mere 4% of whites, demonstrating a 63-point “racial gulf.” *Id.*

“These numbers are relatively shocking by any standard,” says Michael Dawson [author of the study]. “When we talk about gender gaps in American politics, we’re talking about gaps of 5 to 15 percent. Here we’re talking about gaps of the order of 50 to more than 60 percent.” Deeply polarized perceptions of racial equality (or its lack) are a major factor underlying the over-

legal strategy, the politics of confrontation is centered upon a vague and poorly conceptualized notion of tort or unjust enrichment.

Part I of this Article illustrates the manner in which the confrontation model has been recast in legal terms variously under theories of tort or unjust enrichment. Both types of theory attempt to develop a vision of corrective justice, with the tort theories focused on the wrong done to the victim and unjust enrichment concerned with the benefit accruing to the perpetrator of the wrong.<sup>5</sup> Part II demonstrates the ways in which recent political and legal initiatives exposed the shortcomings of confrontationist strategy and developed other avenues of relief. Parts III and IV suggest that these alternate, multiple, political and legal strategies point to a moral and legal case for reparations that does not minimize or simplify, but embraces, the complexity of race relations in America. Instead of a sectional demand for a group or individual right to restitution, reparations requires us to explore the fact of hurt and rejection and to develop strategies to restore and repair the damage done, in partnership, as a nation.

Ultimately, confrontation has its place: it is a legitimate response to a particular form of rejection. But if confrontation is taken as the whole of reparations, we will lose the potential for racial reconciliation that should be at the heart of the reparations movement.

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whelming disparities. While a majority of white respondents (64 percent) thought that blacks had achieved or would soon achieve equality, an even larger majority (78 percent) of blacks believed the opposite: that African Americans would not achieve racial equality in their lifetimes, or that they would never achieve equality.

*Id.*

<sup>5</sup> See Rhonda V. Magee, *The Master's Tools, from the Bottom Up: Responses to African-American Reparations Theory in Mainstream and Outsider Remedies Discourse*, 79 VA. L. REV. 863, 914 (1993) ("More so than any other remedial tradition, reparations resonate with the traditional theory of corrective justice by which the scope of the violation dictates the scope of the remedy, and by which compensation is granted for unjust enrichment."); see also Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 373-97 (1987) (offering classic discussion of the tort model); KIM FORDE-MAZRUI, TAKING THE RIGHT SERIOUSLY: AMERICA'S MORAL RESPONSIBILITY FOR EFFECTS OF PAST RACIAL DISCRIMINATION 26-27 (Soc. Sci. Network Elec. Paper Collection, Working Paper No. 02-1, 2002) (suggesting unjust enrichment as another reason "why society might choose to ameliorate conditions disproportionately suffered by black Americans"), available at [http://papers.ssrn.com/sol3/delivery.cfm/SSRN\\_ID311860\\_code020613630.pdf?abstaid=311860](http://papers.ssrn.com/sol3/delivery.cfm/SSRN_ID311860_code020613630.pdf?abstaid=311860). Matsuda also considers unjust enrichment as an appropriate means of analyzing the duty owed to minority groups claiming reparations. Matsuda, *supra*, at 380 & 3.3(d) n.231.

## I. CONFRONTATIONAL REPARATIONS

Popularly, reparations for African Americans are characterized by a posture of confrontation between the descendants of slaves and the whites who have benefited from slavery. Legal theories of tort or unjust enrichment do not challenge this “confrontational” model but give it legal expression. Unfortunately, the confrontational model embodies a rather narrow technique for obtaining redress and, as I suggest, that shortcoming may infect the legal strategy as well.

Reparations claims that follow the confrontational model tend to focus on one wrong—chattel slavery—and attempt to come up with more or less innovative and more or less legally sound ways to gain some kind of monetary payment for the wrong.<sup>6</sup> Innovation, however, has generally centered around developing tort or quasi-contractual theories to explain the duty owed by whites to blacks for the wrong of slavery. Such theories generally attempt to address the rights and duties implicated in reparations claims through the standard, bilateral model of individual or group rights, in which the rights of one individual or group are pitted against another. In that individual-rights or group-rights model, the point is simply to identify who bears the rights and what their relative strength is. In law, the problem can be expressed in terms of “correlativity” or the “bilateral logic of private law.”<sup>7</sup> On this

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<sup>6</sup> See generally RANDALL ROBINSON, *THE DEBT: WHAT AMERICA OWES TO BLACKS* (2000); Anthony Gifford, *The Legal Basis of the Claim for Slavery Reparations*, *HUM. RTS. MAG.*, Spring 2000, at 16; Art Alcausin Hall, *There Is a Lot to Be Repaired Before We Get to Reparations: A Critique of the Underlying Issues of Race that Impact the Fate of African American Reparations*, 2 *SCHOLAR* 1 (2000); Kevin Hopkins, *Forgive U.S. Our Debts? Righting the Wrongs of Slavery*, 89 *GEO. L.J.* 2531 (2001); Donald Aquinas Lancaster, Jr., *The Alchemy and Legacy of the United States of America's Sanction of Slavery and Segregation: A Property Law and Equitable Remedy Analysis of African American Reparations*, 43 *HOW. L.J.* 171 (2000); Jeremy Levitt, *Black African Reparations: Making a Claim for Enslavement and Systematic De Jure Segregation and Racial Discrimination Under American International Law*, 25 *S.U. L. REV.* 1 (1997); Vincene Verdun, *If the Shoe Fits, Wear It: An Analysis of Reparations to African Americans*, 67 *TUL. L. REV.* 597 (1993); Robert Westley, *Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?*, 19 *B.C. THIRD WORLD L.J.* 429 (1998); Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*, 19 *B.C. THIRD WORLD L.J.* 477 (1998) [hereinafter Yamamoto, *Racial Reparations*]; Rhonda V. Magee, Note, *The Master's Tools, From the Bottom Up: Responses to African-American Reparations Theory in Mainstream and Outsider Remedies Discourse*, 79 *VA. L. REV.* 863 (1993). A notable exception to this trend is one of the earliest modern legal arguments (mostly) supporting reparations. See BORIS I. BITTKER, *THE CASE FOR BLACK REPARATIONS* (First Beacon Press 2003) (1973).

<sup>7</sup> Emma Coleman Jordan, *A History Lesson: Reparations for What?*, 58 *N.Y.U. ANN. SURV. AM. L.* 557, 558 (2003) (quoting HANOCH DAGAN, *THE FOURTH PILLAR: THE LAW & ETHICS OF RESTITUTION* (forthcoming 2003) (manuscript of Chapter 7 at 8)).

model, whosoever has the stronger right—to compensation or to be let alone—in a given instance, wins.<sup>8</sup>

For example, Professor Matsuda, in an early and influential discussion of reparations, recasts the bilateral relations between individual perpetrators and defendants in terms of group rights.<sup>9</sup> In challenging the “rigid” “penchant for . . . close and ordered relations between individual disputants,”<sup>10</sup> Matsuda suggests that a broader notion of group harm can be imposed upon tort law doctrine to enable reparations claims to proceed through the court system.<sup>11</sup>

In another early article, Professor Verdun echoes Matsuda’s analysis. Verdun suggests that reparations advocates would identify the continuing and uncompensated wrong to the community as the “failure to pay for slave labor and the contribution of slaves to the building of this country.”<sup>12</sup> Accordingly, reparations advocates would identify the injured party as all African Americans and the wrongdoer as society. On the one hand, society is doing well and continues to reap the benefits of slave labor. On the other hand, “the injured party is still injured and suffers from the consequences of the wrong.”<sup>13</sup> Thus, reparations advocates would require the entire community to take responsibility for correcting the wrong.<sup>14</sup>

For the purposes of a reparations claim based on the confrontational model of individuals or group rights, these claims can be repre-

<sup>8</sup> Often, this discussion of moral or legal conflict is phrased in terms of “balancing.”

[B]alancing . . . continues to be seductive . . . because it fits our usual conceptions and metaphors of justice, fairness, and reasonableness. Justice holds scales in her hands. We “weigh” the evidence to determine which party prevails. In reaching difficult personal decisions, we list the “pros” and “cons.” Policy makers undertake cost-benefit analyses when choosing among alternative courses of action. Balancing provides a careful, sensitive, thoughtful way to dispense justice, to give each his or her due. By gently urging us to consider all the relevant factors, it fosters serenity and confidence. It is the mark of a reasonable, rational, subtle mind.

T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 962 (1987); see also Patrick M. McFadden, *The Balancing Test*, 29 B.C. L. REV. 585, 596 (1988) (identifying three steps to any balancing test: “announcing the factors to be balanced, weighing those factors, and announcing the victor”).

<sup>9</sup> See Matsuda, *supra* note 5, at 375 (suggesting that a reparations claim is a typical individual rights claim recast as a group rights claim).

<sup>10</sup> *Id.* at 374.

<sup>11</sup> See *id.* at 373–80.

<sup>12</sup> Verdun, *supra* note 6, at 631.

<sup>13</sup> *Id.* at 639.

<sup>14</sup> *Id.* at 631.

sented with equal fidelity as depending upon theories of tort<sup>15</sup> or unjust enrichment.<sup>16</sup> Under either theory, the wrong is constituted by the institution of slavery and the demand is to be made whole for its continuing effects (which may include Jim Crow).<sup>17</sup> Reparations, on this account, involves a demand for restoration of the ill-gotten gains of slavery to the group that was wronged.<sup>18</sup> In so doing, it suggests both a legal strategy and an emotionally compelling moral argument. The legal strategy requires us to identify the various ways that blacks were harmed by whites who profited from slavery and then to sue for the repayment of those profits either to individuals or into some cen-

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<sup>15</sup> A tort is "a civil wrong for which a remedy may be obtained, usually in the form of damages." 74 AM. JUR. 2D *Torts* § 1 (2003). Matsuda, for example, believes that tort theories of reparations partake of the bilateral logic described. See Jordan, *supra* note 7, at 558; Matsuda, *supra* note 5, at 375. Reparations, however, may be expressed as an objective duty founded in respect for the rights of victims of injurious actions. See D.N. McCormick, *The Obligation of Reparation*, 78 PROC. ARISTOELIAN SOC'Y 175, 183-89 (1978). Interestingly, this definition of reparations permits a tort theory of reparations that steers clear of standard theories as to the correlativity of rights and duties that are implicit in the confrontation model. See *id.* at 185.

<sup>16</sup> "Unjust enrichment is 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." 66 AM. JUR. 2D *Restitution and Implied Contracts* § 9 (2002).

It is a general principle, underlying various legal doctrines and remedies, that one person should not be permitted unjustly to enrich himself at the expense of another, but should be required to make restitution of or for property or benefits received, retained, or appropriated, where it is just and equitable that such restitution be made, and where such action involves no violation or frustration of law or opposition to public policy, either directly or indirectly.

*Id.* at § 8.

<sup>17</sup> See, e.g., ROBINSON, *supra* note 6, at 16 (arguing that America can not be whole "until all Americans . . . are repaired in their views of Africa's role in history"). One way to distinguish between the tort and unjust enrichment theories is to suggest that tort law is a form of "corrective justice" that compensates the victim by assessing the magnitude of the loss suffered, whereas unjust enrichment attempts to determine damages by measuring the gain accruing to the perpetrator. See FORDE-MAZURI, *supra* note 5, at 27 n.100. Tort law requires compensation for an injury inflicted. It entails that one group—white Americans—injured another group—African American slaves. See Matsuda, *supra* note 5, at 380-84 (discussing causation, foreseeability, and deterrence in reparations claims). The theory of unjust enrichment entails, first, that one group—in this case, generally, though not limited to, white Americans—has profited (and continues to profit) at the expense of another group—African Americans—and that such profit was wrongful. See 66 AM. JUR. 2D *Restitution and Implied Contracts* §§ 8-9 (2002).

<sup>18</sup> The difference between the two theories lies primarily in the measurement of damages. Under a tort theory, the measure of damages is the injury suffered. Under an unjust enrichment theory, the measure of damages are the benefits accruing to the perpetrator. The damages awarded under the unjust enrichment theory may amount to more, less, or the same as under a tort theory. See FORDE-MAZURI, *supra* note 5, at 27 n.100.

tral fund for more general disbursement.<sup>19</sup> The moral argument asserts that whites as a group were, and continue to be, responsible for the ills of the African American community.<sup>20</sup>

It is the power and simplicity of that moral claim that makes reparations at once so compelling an argument and so difficult for the vast majority of whites to endorse.<sup>21</sup> That power has ensured that the politics of confrontation has been a central feature of much reparations activism. For example, in 1969, James Forman made one of the most famous demands for reparations, interrupting the morning service at New York's (mostly white) Riverside Church to deliver his *Black Manifesto* demanding reparations for African Americans.<sup>22</sup> Forman's confrontational tactics reappear in the rhetoric of "[t]hey owe us," which was the rallying call for the Millions for Reparations March in Washington, D.C. last year.<sup>23</sup> Drawing explicitly on the confrontational structure of the tort and unjust enrichment models, this rhetoric constitutes the reparations debate as a conflict between two rights-bearers, each attempting to demonstrate that his/her rights trump those of the other.<sup>24</sup> Put differently, this debate replicates the traditional, individualistic structure of rights arguments in which individuals compete against each other, African Americans asserting a claim-right to certain property, and white (and other) Americans asserting a liberty-right not to have their property seized.<sup>25</sup>

<sup>19</sup> See, e.g., Ewart Guinier, Book Review, 82 YALE L.J. 1719, 1722 (1973) (arguing that broad reparations legislation will "transcend the difficulties" of individual administration of reparations); Charles J. Ogletree, Jr., *Litigating the Legacy of Slavery*, N.Y. TIMES, Mar. 31, 2002, § 4, at 9 (discussing possibilities for the distribution of reparations on a national level); Charles J. Ogletree, Jr. & E.R. Shipp, *Does America Owe Us?*, ESSENCE, Feb. 2003, at 128 (citing a recent example of reparations paid to black farmers).

<sup>20</sup> See John Hope Franklin, *Letter: Horowitz's Diatribe Contains Historical Inaccuracies* (Mar. 30, 2001), available at <http://squawk.ca/lbo-talk/0103/2289.html>.

<sup>21</sup> See Hodder, *supra*, note 4, at 13 (citing statistical evidence to demonstrate that most people do not endorse reparations).

<sup>22</sup> See BITTKER, *supra* note 6, at 4–5, app. at 159–75. Forman's main demands included the establishment of a black land bank; four major publishing and printing industries; four television networks; a research center; a training center; a welfare rights organization; a labor strike and defense fund; a pan-African business cooperative; and a black university. See James Foreman, *Black Manifesto*, Address Before the Riverside Church of New York City (May 4, 1969), in BITTKER, *supra* note 6, app. at 159–75.

<sup>23</sup> See Jenkins & Harris, *supra* note 2, at C2.

<sup>24</sup> See generally JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1982) (arguing that natural law provides the criteria for evaluating the institutions that secure its benefits).

<sup>25</sup> See, e.g., WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING* 36–39 (Walter Wheeler Cook ed., 1964) (1919) (defining rights and duties, privileges and "no rights").



Part of the problem presented by the confrontational reparations claim is that it is over-inclusive and so fails to provide a satisfactory theory of compensation. The familiar argument is that it identifies too many white people as owing a duty to repay—as injuring or wrongfully enriching themselves at the expense of African Americans—and too many African Americans as having suffered the harm.<sup>26</sup> Many, perhaps most, of the white people in America are not descended from slave owners and many white people's ancestors arrived on these shores after the end of slavery or Jim Crow.<sup>27</sup> Furthermore, there are now many more people of African descent in America than there are those descended from American slaves, and a significant subset of them are not descended from slaves but from free Africans.<sup>28</sup> And the solution—a one-time payment to particular African Americans or to a group—does not seem to be able to right the wrong complained of. Such payments run the risk of failing to address the continuing problems bequeathed society by the United States's history of slavery and Jim Crow.<sup>29</sup> Politically, legally, and morally, this face-to-face, duke-it-out aspect of unjust enrichment encourages some of the bellicose attitudes common on both sides of the reparations debate. While a little fire and brimstone can be a good thing, too much of the discussion of race in America and elsewhere is characterized by the various participants shouting past, rather than talking to, each other.<sup>30</sup>

Nevertheless, I do not here wish to reject the confrontation model totally. To a great extent, it forms what Professor Bell has called the

<sup>26</sup> See Horowitz, *supra* note 3, ¶ 3.

<sup>27</sup> See *id.* ¶¶ 3, 4.

<sup>28</sup> See *id.* This probably explains the popularity of “psychological harm” theories that seek to account for the experience of many African Americans in the continuing psychological harm bequeathed by slavery. Irma Jacqueline Ozer, *Reparations for African Americans*, 41 How. L.J. 479, 492 (1998); Verdun, *supra* note 6, at 634. While I am somewhat sympathetic to such arguments, I think there are candidates closer to home that do a better job of explaining what DuBois analyzed as the double—one might say multiple—categories of citizenship and community that African Americans must negotiate in order to have an American identity. See W.E.B. DUBOIS, *THE SOULS OF BLACK FOLK* 3–4 (1931) (describing the double identity of a black as an African American, “even feel[ing] his dual identity—an American, a Negro”). Some of these candidates may be traceable back to slavery. But to focus on a unique psychological harm experienced by all descendants of slaves strays too close to essentialism for my liking.

<sup>29</sup> See Keith N. Hylton, *A Framework for Reparations Claims*, 24 B.C. THIRD WORLD L.J. 31, 36 (2004). Hylton argues that there is no direct link to be made between reparations lawsuits and broad uplift for African Americans. See *id.*

<sup>30</sup> See, e.g., PATRICIA WILLIAMS, *THE ROOSTER'S EGG: ON THE PERSISTENCE OF PREJUDICE* 118–19 (1995) (providing example of people's anger when confronted with racial humor).

“emotional component”<sup>31</sup> of reparations.<sup>32</sup> In addition, the confrontational legal model of individual and group rights has gained a great deal of popular recognition and now forms the populist understanding of reparations. A couple of examples from popular culture demonstrate the appeal of this type of claim, even as it is caricatured. Chris Rock and Wanda Sykes have discussed reparations in recent comedy sketches on their respective and eponymous television shows.<sup>33</sup> The sketches are somewhat similar. For example, on HBO’s *Chris Rock Show*, Rock stopped strangers on the street in two districts of New York. In Harlem, Rock found that African Americans believed they deserved millions of dollars worth of reparations. In midtown Manhattan, Rock accosted white interviewees and demanded to know how much they were willing to pay for reparations. The most popular response to his request for even one dollar’s worth of reparations was “[k]iss my white butt.”<sup>34</sup> In the variation of this segment run on Fox’s *Wanda*, Sykes also decided to pursue her reparations on the street. “[S]he walked up to a white man and totted up his tab on an adding machine. She said to him, ‘Hi, I’m black. You owe me fifteen dollars and thirteen cents,’ and handed him the bill.”<sup>35</sup>

These segments are certainly amusing; they also provide a subtle (or not so subtle) critique of the confrontational reparations model as

<sup>31</sup> Derrick A. Bell, Jr., Book Review, *Dissection of a Dream*, 9 HARV. C.R.-C.L. L. REV. 156, 158 (1974) (arguing that “there is a tactical loss in excluding the slavery period: setting this voluntary limitation on coverage sacrifices much of the emotional component that provides the moral leverage for black reparations demands”).

<sup>32</sup> On one level, the confrontational model, in requiring that the conflicting rights of victim and perpetrator are judged in a structure that emphasizes nominal equality, serves to validate the legitimacy of the claim of injury suffered by slaves and their descendants. See Matsuda, *supra* note 5, at 374–75 (analogizing a reparations claim to the standard legal claim). On another level, the confrontational model can be regarded as a visceral expression of the outrage consequent to the psychological injury suffered during and after slavery. See Magee, *supra* note 5, at 894–95 (arguing that the “unwillingness of legislative reformers to eradicate the legacy of slavery through economic redistribution . . . created a legal-political climate in which blacks were vulnerable to extreme opposition and intimidation”).

<sup>33</sup> See Nancy Franklin, *Watching Wanda: A Big Personality Hits the Small Screen*, NEW YORKER, May 5, 2003, at 102–03 [hereinafter Franklin, *Watching Wanda*] (discussing *Wanda at Large*); Charles J. Ogletree, Jr., *The Case for Reparations*, USA WEEKEND, Aug. 18, 2002, ¶ 9 [hereinafter Ogletree, *The Case for Reparations*] (discussing *The Chris Rock Show*), available at [http://www.usaweekend.com/02\\_issues/020818/020818reparations.html](http://www.usaweekend.com/02_issues/020818/020818reparations.html) (last visited Nov. 4, 2003). Wanda Sykes is herself a former star of, and writer for, *The Chris Rock Show*. Franklin, *Watching Wanda*, *supra*, at 102–03.

<sup>34</sup> See Ogletree, *The Case for Reparations*, *supra* note 33, ¶ 9.

<sup>35</sup> Franklin, *Watching Wanda*, *supra* note 33, at 102. Viewed in light of *The Black Manifesto*, Sykes’s choice of just over fifteen dollars for reparations is perhaps not so fanciful: Forman also demanded fifteen dollars. See Magee, *supra* note 5, at 883.

a theory of compensation. So understood, I would suggest that the humor in these comedy sketches does not reside in the perceived absurdity of the demand for reparations.<sup>36</sup> Certainly, Rock graphically illustrates how race affects the divergent valuations of the injury suffered, and part of the joke is the difference between the magnitude of the demand made by individual African Americans compared with the paucity of the white foils' payment. Sykes' sketch also interrogates the amount of reparations to be paid: here, the paucity of her demand is part of the joke, as if an extra fifteen dollars could wash away the problems of slavery. But neither of these observations fully account for our laughter: the joke targets not so much the reparations claim itself<sup>37</sup> as the manner in which it is presented—two aggressive African Americans picking randomly on individual whites. In fact, we laugh not only at the manner in which the demand for reparations is made, but the white person's discomfort at the manner in which the demand is made.<sup>38</sup>

More particularly, both these segments embody, in a very literal sense, one version of the African-American demand for reparations. It is this literalness that contributes so strongly to the joke, which carries the weight it does precisely because it represents the confrontational view of reparations: blacks demanding money from whites (in the case of Rock and Wanda Sykes, right in your face) as a payment for wrongs inflicted during slavery.

As good as confrontation feels,<sup>39</sup> however, if reparations, as a political and legal strategy, is to serve some other function than simply

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<sup>36</sup> This would suggest that Horowitz's critique of reparations as a free handout for African Americans was the point made by the joke. Here, the joke draws upon the stereotype of African Americans as "playing the victim card." See, e.g., John McWhorter, *Blood Money: Why I Don't Want Reparations for Slavery*, AM. ENTER., July 1, 2001, at 20 (discussing reparations as an example of African-American "victimologist thought"), available at [http://www.theamericanenterprise.org/issues/articleid.15514/article\\_detail.asp](http://www.theamericanenterprise.org/issues/articleid.15514/article_detail.asp) (last visited Nov. 4, 2003). On this understanding, the joke works because Rock and Sykes present themselves as representatives of a "debtor race." See FORDE-MAZRUI, *supra* note 5, at 26 n.99 (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring) ("Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or a debtor race.")).

<sup>37</sup> That is, it is not the fact that reparations is itself laughable.

<sup>38</sup> This analysis of the joke suggests that either the white person or the audience recognizes African American claims as, in some way, justified. Additionally, in the Rock sketch, we may also laugh at the white person's ignorance of the validity of the reparations claim made by African Americans.

<sup>39</sup> Part of the joke is the obvious relish with which Rock and Sykes make their demands for reparations.

being deployed as a tool with which to bludgeon whites, it is worth endorsing only if it promotes debate, rather than accusatory monologues. The current multiplicity of litigative and legislative attempts to address the issue of reparations for African Americans suggests that the “confrontational” strategy is neither the only legal or political option nor the one most likely to succeed. The current reparations litigation and legislation that is being pursued domestically and internationally<sup>40</sup> indicates that the confrontational focus on slavery reparations may be too narrow to capture both the harm inflicted and the legal strategies to remedy that harm. The payoff of the confrontational strategy is both narrow and unimaginative and unlikely to produce the sort of social change envisaged by reparations proponents from the 1860’s through the 1960’s to today.<sup>41</sup> It takes for granted that reparations proponents seek financial redress for wrongs inflicted in the past on the basis of some more-or-less moral or more-or-less legal theory of torts or unjust enrichment.<sup>42</sup>

Moving away from torts or unjust enrichment as the central reparations strategy enables a reorientation of the reparations debate to

<sup>40</sup> See *Alexander v. Governor of State of Oklahoma*, No. 03-CV-133 (N.D. Okla. filed Feb. 28, 2003); *In re African Am. Litig.*, No. 02-CV-7764 (N.D. Ill. filed Oct. 28, 2002); *Hurdle v. FleetBoston Fin. Corp.*, No. 02-CV-04653 (N.D. Cal. filed Sept. 25, 2002); *Johnson v. Aetna Life Ins. Co.*, No. 02-CV-2712 (E.D. La. filed Sept. 3, 2002); *Porter v. Lloyds of London*, No. 02-CV-6180 (N.D. Ill. filed Aug. 29, 2002); *Ntzebesa v. Citigroup, Inc.*, No. 02-CV-04712 (S.D.N.Y. filed Jun. 19, 2002); *Barber v. N.Y. Life Ins. Co.*, No. 02-CV-2084 (D.N.J. filed May 2, 2002); *Carrington v. FleetBoston Fin. Corp.*, No. 02-CV-01863 (E.D.N.Y. filed Mar. 26, 2002); *Farmer-Paellmann v. FleetBoston Fin. Corp.*, No. 02-CV-1862 (E.D.N.Y. filed Mar. 26, 2002); *Hurdle v. FleetBoston Fin. Corp.*, No. CGC-02-412388 (Cal. Super. Ct. filed Sept. 10, 2002); see also *Khulumani v. Barclays Nat’l Bank*, No. 02-CV-05952, (E.D.N.Y. filed Nov. 12, 2002) (seeking reparations for crimes practiced during Apartheid regime in South Africa). *Porter, Barber, Farmer-Paellmann, Carrington, Johnson, and Hurdle* (02-CV-04653) have all been transferred to the Northern District of Illinois pursuant to 28 U.S.C. § 1407 (multi-district litigation) and consolidated with *In re African American Litig.* See Minute Order, *In re African American Litig.*, No. 02-CV-7764 (N.D. Ill. Jan. 17, 2003).

<sup>41</sup> See Verdun, *supra* note 6, at 600–02 (noting that Thaddeus Stevens suggested reparations to freed slaves before the Civil War; and noting episodes of political activism, including claims in the 1960s and 1970). In fact, reparations arguments started significantly before 1860. Guinier, *supra* note 19, at 1720–21. In 1829, David Walker “passionately protested the lack of compensation for the labor of slaves.” *Id.* at 1721; see also Charles J. Ogletree, Jr., *Repairing the Past: New Efforts in the Reparations Debate in America*, 38 HARV. C.R.—C.L. L. REV. 279, 285–90 (2003) [hereinafter Ogletree, *Repairing the Past*] (providing a brief history of the African American reparations movement).

<sup>42</sup> See, e.g., Alfred L. Brophy, *Some Conceptual and Legal Problems in Reparations for Slavery*, 58 N.Y.U. ANN. SURV. AM. L. 497, 536–37 (2003) (discussing broad range of remedies sought by reparations activists); Anthony J. Sebok, *Reparations, Unjust Enrichment, and the Importance of Knowing the Difference Between the Two*, 58 N.Y.U. ANN. SURV. AM. L. 651, 654–57 (2003) (discussing the problems with treating reparations claims as equity claims).

focus on group uplift as a national imperative rather than as a sectional imperative, as an “American thing” rather than as a “black thing.” The current legal and legislative discussion of what reparations is, and what types of reparations are appropriate, does and must depend upon a broader notion of the harm inflicted and must reflect the particular wrongs that need to be “repaired.” That the harm inflicted and the benefits accrued are not singular but plural, affecting a range of communities at different times and in different ways, enables a more nuanced response to reparations’ critics and a more profound discussion of race in America and elsewhere.

## II. DIFFERENT LEGAL STRATEGIES IN REPARATIONS MOVEMENTS

Confounding the narrow scope of the confrontational model, recent political and legal initiatives exposed the shortcomings of the confrontational model of reparations and developed alternative models of relief. By broadly reconceiving reparations as a goal or a claim or an argument, rather than as a strategy of monetary recompense, these initiatives demonstrate that significant progress can be made on the legal, legislative, moral, and political fronts.

Although the different reparations movements do have common elements, the goals of reparations are multifarious. In essence, what links the various demands for reparations is that there be both an accounting of and for past behavior, and some kind of reckoning for that behavior.<sup>43</sup> It is this latter element—that there be a reckoning—that distinguishes reparations from apology.<sup>44</sup> The goal of the various reparations movements, which is implicit in the “reckoning” strand of the definition, is some sort of equitable redistribution of resources. Thus, as discussed in this section, all the currently filed reparations

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<sup>43</sup> See, e.g., Yamamoto, *Racial Reparations*, *supra* note 6, at 490–91 (comparing the Japanese-American reparations claim to successful African-American reparations claims). I consider the moral and philosophical underpinnings of reparations to be deeply and particularly American, drawing forcefully upon ideas embodied in the various founding political and philosophical texts that mark one strand of what counts as American distinctiveness.

<sup>44</sup> On apologies for racism, see generally Eric K. Yamamoto, *Race Apologies*, 1 J. GENDER RACE & JUST. 47 (1997). It is worth noting, however, that there has been no apology for slavery or Jim Crow segregation from the United States government. See *Slavery Reparations Advocates Voice Demands in Washington*, N.Y. TIMES, Aug. 18, 2002, § 1, at 30. In contrast, the government has apologized for the internment of Japanese Americans during World War II. See Civil Liberties Act of 1988, 50 U.S.C. app. § 1989 (1988). The government has also apologized for its experimentation on African Americans without their knowledge in the Tuskegee syphilis case. See Alison Mitchell, *Clinton Regrets ‘Clearly Racist’ U.S. Study*, N.Y. TIMES, May 17, 1997, § 1, at 10.

lawsuits seek not only some form of accounting for the harm(s) they identify, but also some form of compensation for that harm. But the appropriate reckoning depends upon the injury inflicted. This more general definition of reparations-as-reckoning permits a greater variety of political, moral, and particularly legal strategies directed at achieving the goal of redistribution of resources without specifying in advance what types of redistribution are appropriate and how the redistribution is to be accomplished.<sup>45</sup>

There are currently a variety of legal strategies being pursued to obtain reparations both nationally and internationally.<sup>46</sup> These strategies essentially focus on two types of defendants: those corporations that have participated in and benefited from racial discrimination through slavery or Jim Crow; and those governmental entities that have practiced slavery or Jim Crow. As far as I am aware, there is only one lawsuit on file that names individual defendants rather than corporations or government entities.<sup>47</sup> This is no accident: generally, the goal so far has been to avoid pointing fingers at individuals.

#### A. Corporate Defendants

Edward Fagan and Roger Wareham are the two lead attorneys who have filed reparations lawsuits in Illinois, Texas, New York, New Jersey, and Louisiana.<sup>48</sup> These attorneys rely principally upon the work of

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<sup>45</sup> I believe the open-endedness of the "redistribution" issue is a virtue, not a vice. My view is that some of the most promising aspects of the reparations will prove to be the discussions of first, the relation between the harm and the proposed restitution and, second, the forms that restitution is to take. This latter argument challenges civil rights proponents to move from the defensive to the offensive. Rather than simply battling the rollback of the civil rights gains made during the 1950s, 1960s, and 1970s (a battle that remains worth fighting), reparations challenges civil rights activists to propose a positive agenda of social spending, and to lay out the economic and social costs of that agenda. To this extent, while Professor Hylton's arguments regarding the justice and social welfare approaches are both forceful and challenging, they should be seen as marking the beginning, not the end, of the discussion, as they engage with but two of the multiple forms of reparations restitution potentially available. See Hylton, *supra* note 29, at 32–33.

<sup>46</sup> See Ogletree, *Repairing the Past*, *supra* note 41, at 294–97 (discussing variety of current reparations lawsuits).

<sup>47</sup> That suit is *Carter v. Jones*, No. 03–CV–0485 (W.D. Miss. 2003). While that complaint was filed by one of the local counsel in *Alexander v. Oklahoma*, the Tulsa Race Riot case, it was not filed by the Reparations Coordinating Committee. The Reparations Coordinating Committee has certainly so far scrupulously avoided suing individuals.

<sup>48</sup> See First Amended & Consolidated Complaint at 113–15, *In re African Am. Descendants' Slave Litig.*, (N.D. Ill. 2003) (No. 1491) (on file with author); *The Opening Shots*, 22 AM. LAWYER 6, June, 2002, Westlaw, 6/2002 Am. Law. 22; Bill Rigby, 12 *Companies Face Slav-*

Deadria Farmer-Paellmann to identify corporations involved in slavery, and have listed her as the class plaintiff in the first-filed suit, *Farmer-Paellmann v. FleetBoston*, filed in the Eastern District of New York on March 26, 2002.<sup>49</sup> Each of these suits alleges five claims: conspiracy; demand for accounting; human rights violations; conversion; and unjust enrichment.<sup>50</sup> They follow the confrontational, unjust enrichment, model of reparations litigation, but add a relatively imaginative understanding of who ought to be defendants,<sup>51</sup> suing corporations rather than the federal government.<sup>52</sup> Nonetheless, these suits manifest a very traditional notion of the injury inflicted and the remedy required.

Another set of lawsuits, filed in California by Attorney Barbara K. Ratliff, working again with Ms. Farmer-Paellmann, uses that state's private attorney general rule<sup>53</sup> to sue corporations under California's Unfair Competition Law.<sup>54</sup> That statute prohibits any "unlawful, unfair or fraudulent business act or practice." Included under the California statute is almost "anything that can properly be called a business practice and that at the same time is forbidden by law," and so the statute would appear to catch corporate involvement with slavery as being among those practices.<sup>55</sup> The remedies authorized by the act include injunctive relief and restitution.<sup>56</sup> So, by permitting anyone to bring suit on behalf of the state of California, this legislation allows litigants to avoid the problems of standing that affect the more traditional lawsuits and to produce a plaintiff that represents the whole community. Furthermore, the available remedies are somewhat broader than the

ery Suits; *Reparations Sought for Pre-1865 Gains*, FLA. SUN-SENTINEL, Sept. 4, 2002, Westlaw, 9/4/02 sunsent 5A.

<sup>49</sup> See Complaint & Jury Trial Demand at 1, *Farmer-Paellmann v. FleetBoston Fin. Corp.* (E.D.N.Y. 2002) (No. 02-CV-1862); Joyce Shelby, *Slaves Seeking Redress Class Action Suit for Reparations to Descendants*, N.Y. DAILY NEWS, Mar. 27, 2002, 2002 WL 3170753.

<sup>50</sup> See First Amended & Consolidated Complaint at 93-109, *In re African Am. Descendants' Slave Litig.* (N.D. Ill. 2003) (No. 1491).

<sup>51</sup> Though imaginative, this theory is consistent with the Holocaust litigation model. See generally Michael J. Bazylar, *Nuremberg in America: Litigating the Holocaust in United States Courts*, 34 U. RICH. L. REV. 1 (2000) (examining comprehensively Holocaust litigation against banks, insurance companies, and German corporations).

<sup>52</sup> The federal government is popularly regarded as the most likely target for reparations.

<sup>53</sup> See CAL. CIV. PROC. CODE § 1021.5 (West 1980).

<sup>54</sup> See CAL. BUS. & PROF. CODE § 17200 (West 1997); *Hurdle v. FleetBoston Fin. Corp.*, No. 02-CV-04653, at 37-38 (N.D. Cal. filed Sept. 25, 2002); *Hurdle v. FleetBoston Fin. Corp.*, No. CGC-02-0412388, at 37-38 (Cal. Super. Ct. filed Sept. 10, 2002).

<sup>55</sup> *Smith v. State Farm Mut. Ins. Co.*, 113 Cal. Rptr. 2d 399, 414 (Cal. Ct. App. 2001).

<sup>56</sup> See CAL. BUS. & PROF. CODE § 17203 (West 1997).

traditional injunctive relief lawsuit. Both of these sets of lawsuits seek to recover for the wrongs of slavery.

One problem faced by such lawsuits is the more or less random manner in which their defendants are selected. Essentially, the defendants in the current lawsuits happen to be those turned up by Ms. Farmer-Paellman during the course of her research.<sup>57</sup> While her efforts are laudable,<sup>58</sup> it is not clear that they are particularly systematic. Such problems promise to be remedied by the spate of statutes and ordinances passed recently demanding an accounting of corporate involvement in slavery. A number of states and municipalities have passed legislation requiring corporations to divulge links with slavery, including California, Chicago, and Los Angeles.<sup>59</sup> Such statutes promise to impose a measure of uniformity upon the information gathered and, in so doing, increase the equity of those lawsuits that sue various corporations or industries for profiting from slavery.

Another problem is that, apart from a claim for unjust enrichment, these lawsuits have not developed a theory of compensation beyond the "confrontational" demand for restitution of profits accrued through slavery. Nonetheless, despite the problems with these lawsuits, they appear to provide a useful mechanism for developing alternative understandings of corporate responsibility for slavery.

One way in which these lawsuits can develop alternative political and legal strategies for reparations claims is by exposing the vast un-

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<sup>57</sup> See James Cox, *Reparations Activist: 'We're Still Living with the Vestiges of Slavery,'* USA TODAY, Feb. 23, 2002, at A9 (noting that Farmer-Paellmann discovered 60 corporations that profited in slavery during the course of five years of research in libraries and online).

<sup>58</sup> See *id.* Professor Ogletree has stated that although "[t]he idea of corporate involvement has always been raised in the reparations movement . . . I don't think anybody has been as conscientious or as thorough as Deadria. She is the key factor in making these (legal) claims come to life." *Id.*

<sup>59</sup> See California Slave Era Insurance Act, CAL. INS. CODE §§ 13810–13813 (West Supp. 2003); John M. Broder, *The Business of Slavery & Penitence*, N.Y. TIMES, May 25, 2003, § 4, at 4 (discussing Los Angeles City Council's unanimous approval of "an ordinance . . . that would require any company wishing to do business with Los Angeles to investigate and disclose any profits derived from the American slave trade"); Erika Kinetz, *What's the Cost of Freedom? What About Slavery?*, N.Y. TIMES, Apr. 27, 2003, § 14, at 6 (discussing a bill proposed to the New York City Council that would require "companies doing business with the city to 'search their past and reveal whether they have engaged in or profited from slavery'"); Sabrina L. Miller & Gary Washburn, *New Chicago Law Requires Firms to Tell Slavery Links*, CHI. TRIB., Oct. 3, 2002, § 2, at 1. The most famous piece of modern reparations litigation, H.R. 40, first proposed by Representative John Conyers in 1989, also steers clear of the confrontational model, calling instead for an investigation of the wrongs inflicted by slavery without demanding reparations. See Commission to Study Reparations for African Americans Act, H.R. 40, 108th Cong. (2003). H.R. 40 should be seen as the inspiration behind much of the recent reparations legislation.



derdevelopment of the African-American population. In particular, the concept of “underdevelopment” points to the systematic enslavement and exploitation of the African-American population that ensured that money and other resources were channeled to whites and denied to African Americans.<sup>60</sup> The concept of underdevelopment is used by Walter Rodney, Guyanese scholar and activist, to explain why Africa failed to flourish despite its vast natural resources.<sup>61</sup> He suggests that Africa was deliberately kept in an underdeveloped state by colonial exploiters to provide cheap minerals and free labor.<sup>62</sup> The type of injury asserted through the Farmer-Paellmann lawsuits appears to fall within this type of analysis. Where, in Africa, colonial whites enjoyed a higher standard of living at the expense of the Africans they subjugated,<sup>63</sup> so too in America did white individuals from across the country profit from the wrongs of slavery and Jim Crow.<sup>64</sup> Reparations could thus include the goal of remedying this broad-based harm, in part by explaining that the whole country profited in disparate ways from slavery and segregation. Such an emphasis calls for some form of educative initiative on the part of the corporations or industries sued by way of reckoning with their past.

### B. *Tulsa Litigation*

A different form of litigation is that with which I am involved,<sup>65</sup> seeking reparations for the Tulsa Race Riot of 1921.<sup>66</sup> This is a particularly traditional civil-rights lawsuit but a relatively imaginative reparations suit. A criticism of African-American reparations has been its failure to present a legal strategy that comports with the type of claims usually advanced in a traditional civil rights lawsuit.<sup>67</sup> Reparations lawsuits just look too different from traditional civil rights litiga-

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<sup>60</sup> See WALTER RODNEY, *HOW EUROPE UNDERDEVELOPED AFRICA* 13–15 (1982).

<sup>61</sup> *Id.*

<sup>62</sup> See *id.* at 149–50, 178–80.

<sup>63</sup> *Id.* at 151.

<sup>64</sup> See MANNING MARABLE, *HOW CAPITALISM UNDERDEVELOPED BLACK AMERICA: PROBLEMS IN RACE, POLITICAL ECONOMY, & SOCIETY* 2 (updated ed. 2000).

<sup>65</sup> See Randy Krehbiel, *Big-name Attorneys Join Riot Lawsuit*, *TULSA WORLD*, Feb. 26, 2003, at A11 (“Several sources say most of the work on the complaint filed Monday was done by [Professor Charles] Ogletree and Eric Miller, a relatively little known Harvard University lawyer.”).

<sup>66</sup> See *Alexander v. Governor of State of Okla.*, No. 03–CV–133 (N.D. Okla. filed Feb. 28, 2003).

<sup>67</sup> See Yamamoto, *Racial Reparations*, *supra* note 6, at 489–91 (comparing Japanese-American and slavery lawsuits).

tion, critics claim, to succeed in court.<sup>68</sup> Indeed, the success of the Holocaust reparations litigation and Japanese-American reparations litigation has been in providing a traditional civil rights context for reparations cases and to focus on tolling or otherwise avoiding the statute of limitations.<sup>69</sup> That is our tactic in the Tulsa case as well.<sup>70</sup> We can point to individual victims who have standing to sue, and also to a community wronged by state and municipal action or inaction.<sup>71</sup> This type of lawsuit, which seeks injunctive and monetary relief, anticipates a relatively imaginative range of solutions to the problems of discrimination in Oklahoma.<sup>72</sup>

The innovations heralded by the Tulsa litigation do not end with the form of the lawsuit but extend into the types of remedies contemplated by such a suit. Part of the promise of the Tulsa litigation is to explore the extent to which a reparations lawsuit can replicate the bilateral model of rights and duties and yet simultaneously develop other theories of rights and remedies.<sup>73</sup> The opportunity presented by the Tulsa litigation is to provide a broad-based educational program

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<sup>68</sup> See *id.*; see also Hylton, *supra* note 29, at 32–33, 37–40 (discussing *Farmer-Paellmann* lawsuit as markedly different from traditional civil-rights lawsuits).

<sup>69</sup> See Yamamoto, *Racial Reparations*, *supra* note 6, at 490; see also ALFRED BROPHY, RECONSTRUCTING THE DREAMLAND: THE TULSA RIOT OF 1921, at 103–04, 105, 109–10 (2002).

<sup>70</sup> See BROPHY, *supra* note 69, at 103–19. The single most important work setting forth the legal justifications for the Tulsa lawsuit is Professor Brophy's book on the Tulsa Riot of 1921. Professor Brophy and his book have been instrumental in authoritatively determining the factual basis for the claims in *Alexander v. Governor of State of Oklahoma*. See *Alexander*, No. 03–CV–133.

<sup>71</sup> See First Amended Complaint at 2–10, *Alexander* (No. 03–CV–133) (Feb. 28, 2003), available at <http://www.ncobra.org/pdf/files/FirstAmendedComplaint.pdf> (last visited Nov. 4, 2003).

<sup>72</sup> For example, the concept of underdevelopment applies to this lawsuit as to the slavery suits. Before the riot and, ironically, in large part due to racial discrimination, money spent by African Americans in Greenwood tended to stay in Greenwood to the benefit of the whole community. See Charles J. Ogletree, Jr., *The Current Reparations Debate*, 36 U.C. DAVIS L. REV. 1051, 1067–68 (2003) [hereinafter Ogletree, *The Current Reparations Debate*] (“Before the Riot, the black dollar would circulate thirty-five times before leaving the community.”). The riot ended all of that; after the riot, Greenwood dollars went directly to whites. *Id.* In recognition of that fact, the 1921 Tulsa Race Riot Reconciliation Act of 2001 created the Greenwood Area Redevelopment Authority (“GARA”) to stimulate business in Greenwood. OKLA. STAT. ANN. tit. 74 §§ 8221–8226 (West Supp. 2003). It remains to be seen whether GARA has the desired effect of undoing the damage caused by the riot, although initial reports are not encouraging. See P.J. Lassek, *Action Delayed on Proposal for Higher Park Fees*, TULSA WORLD, Jan. 25, 2002, at 13 (reporting delays and objections to appointments to GARA). Given that the riot had repercussions throughout the state, however, some form of statewide initiative modeled upon GARA may also be appropriate.

<sup>73</sup> It is this aspect of reparations litigation that is so far ignored by the *Farmer-Paellmann* lawsuit.

that alerts the people of Oklahoma to the history of racism that precipitated the riot and continued in its wake.<sup>74</sup> I think it is clear that the unjust enrichment model is insufficient to organize a diverse, grassroots activism.

Interestingly, much of the impetus to develop broad-based and innovative relief comes from the Oklahoma Commission to Study the Tulsa Race Riot of 1921, which was created by the state of Oklahoma in part to account for the state's and city's responsibility for entrenching Jim Crow.<sup>75</sup> Not only did the Commission have the power to publish new information discovered through a painstaking search through historical records, but the state also empowered it to make recommendations.<sup>76</sup> In uncovering much previously unavailable material, the Commission recommended that reparations should be paid to the survivors and descendants.<sup>77</sup> Nevertheless, the process of reckoning recommended by the Commission has been implemented haltingly, if at all, by the state of Oklahoma and the city of Tulsa. The lawsuit was therefore filed with the goal, not only of achieving restitution for the survivors of the riot, but compelling the state and city to complete the process begun by the Riot Commission.

Any solution intended to address the consciousness-raising aspect central to the educational, political, and moral aspirations of reparations requires a holistic approach that adequately informs people about the real history of racial inequality in Oklahoma. Some form of broad injunctive relief may prove appropriate here. Although there are major obstacles to obtaining relief from the state,<sup>78</sup> injunctive relief may be warranted if, as in *Alexander v. Governor of State of Oklahoma*, a state officer is sued in his or her official capacity.<sup>79</sup>

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<sup>74</sup> See generally SCOTT ELLSWORTH, DEATH IN A PROMISED LAND: THE TULSA RIOT OF 1921 (1982) (documenting racism in Tulsa leading up to the riot and warning that a "segregation of memory" will continue to exist "as long as the injustice which has bred it continues").

<sup>75</sup> A significant alternative source has been the pioneering work and insightful suggestions of Professor Alfred Brophy, another contributor to this symposium.

<sup>76</sup> See OKLA. COMM'N TO STUDY THE TULSA RACE RIOT OF 1921, TULSA RACE RIOT, at ii (Comm. Print 2001), available at [www.tulsareparations.org/TRR.htm](http://www.tulsareparations.org/TRR.htm).

<sup>77</sup> *Id.* at 20.

<sup>78</sup> The most notable obstacle is the Eleventh Amendment's grant of sovereign immunity to the states. See U.S. CONST. amend. XI. "The heart of the Eleventh Amendment is its grant of state sovereign immunity from federal court monetary relief designed to compensate for past wrongs." 1B MARTIN A. SCHWARTZ & JOHN E. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS & DEFENSES § 8.3, at 156 (3d ed. 1997).

<sup>79</sup> See First Amended Complaint at 192, *Alexander v. Governor of State of Oklahoma*, (N.D. Okla. 2003) (No. 03-CV-133) (on file with author). Under the doctrine announced

Interestingly, the state itself has established the necessary historical nexus<sup>80</sup> between the riot and its current remedial efforts in enacting the Tulsa Race Riot of 1921 Reconciliation Act of 2001.<sup>81</sup> The state's chosen remedy—to set up an education fund that provides no more help to the descendants of survivors than was previously available<sup>82</sup>—appears insufficient on its face, given the state's active suppression of the riot and its recognition that it participated in a “conspiracy of silence.”<sup>83</sup> Some more general educational relief is not only warranted morally, but legally as well.

To this end, a principal goal of the Tulsa and other reparations litigation should be to educate the community about the state of race relations in the community affected. Put differently, when the impact of the discrimination at the basis of the wrong is state wide, a state-wide educational remedy should be sought.<sup>84</sup> There are many resources the state could use to accomplish this goal that are already at its disposal. Perhaps one appropriate form of injunctive relief would be to require the state to create a commission to study a curriculum. This curriculum would be taught in all schools and would describe the history of race relations in Oklahoma that created the riot and the various other incidents of race-based violence and discrimination both before and after the riot, so as to permanently end the “conspiracy of silence”<sup>85</sup> that has for so long dominated these issues. The de-

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in *Ex parte Young*, 209 U.S. 123, 159–60 (1908), suits against a state officer in his or her official capacity for prospective injunctive or declaratory relief are permissible under the Eleventh Amendment. “The *Young* doctrine recognizes that if a state official violates federal law, he is stripped of his official or representative character and may be personally liable for his conduct; the State cannot cloak the officer in its sovereign immunity.” *Idaho v. Coeur d’Alene Tribe*, 521 U.S. 261, 288 (1997) (O’Connor, J., concurring); *Wolfe v. Ingram*, 275 F.3d 1253, 1260 (10th Cir. 2002).

<sup>80</sup> See *Green v. Mansour*, 474 U.S. 64, 67 (1985) (holding that there must be some “ongoing violation of federal law” that provides a nexus between the relief requested and the injury asserted).

<sup>81</sup> OKLA. STAT. ANN. tit. 70, §§ 2621–2627 (West Supp. 2003) (authorizing Tulsa Reconciliation Education and Scholarship Program (“TRESP”)); OKLA. STAT. ANN. tit. 74, § 8000.1 (West 2002) (making legislative findings); OKLA. STAT. ANN. tit. 74, § 8201.1 (West 2002) (creating race riot memorial committee); OKLA. STAT. ANN. tit. 74, § 8205 (West 2002) (certifying riot survivors); OKLA. STAT. ANN. tit. 74, §§ 8221–8226 (creating Greenwood Area Redevelopment Authority (“GARA”).

<sup>82</sup> OKLA. STAT. ANN. tit. 70, §§ 2621–2627 (West Supp. 2003).

<sup>83</sup> See OKLA. STAT. ANN. tit. 74, § 8000.1 (West 2002).

<sup>84</sup> To use the language of reckoning and accounting introduced at the beginning of this paper, a full accounting of the causes and effects of the riot suggests a statewide series of injuries, and a proper reckoning for those injuries suggests a series of statewide responses.

<sup>85</sup> See OKLA. STAT. ANN. tit. 74, § 8000.1 (West 2002).

velopment of such educational programs will benefit not only the descendants of riot victims, but all Oklahomans. In this way, even though reparations lawsuits begin in confrontation, it may be possible to develop a model in which they end in consensus.

### III. A NEW MODEL OF MORAL DISCOURSE FOR REPARATIONS: THE CONVERSATIONAL MODEL

The discussion so far has focused primarily on describing the manner in which reparations litigation could go beyond a narrow focus on the bilateral or confrontational model of reparations to develop more diverse strategies and remedies. In turn, these alternate political and legal strategies suggest a larger moral argument for reparations that embraces the complexity of race relations in America. In particular, the experiences of the Tulsa and other reparations litigation can and should be placed in the context of a moral argument for a national interest in the goal of reparations. My goal is first to establish the foundation for a moral argument for reparations, which I refer to as the "conversational model," and then to apply this moral framework in the context of reparations claims.

Once one steps outside the confrontational framework of a battle between individual rights, the moral argument for reparations is perhaps more complex than is generally suggested. As noted, reparations claims are popularly characterized by a confrontational model of individual or group rights that pits one party's right to compensation against another party's right to be left alone.<sup>86</sup> In morality, this comports with a view of rational choice in which, if reasons compete, decision should be made for the strongest reason. Here, reason (a reason) determines which option an agent ought to choose: she ought to choose that option which has strongest, or weightiest, or best reasons in its support. Choosing an option involves no more than discovering the strongest reason and applying it. On this model, to use Professor Dworkin's catchphrase, there is never "no right answer."<sup>87</sup> Reason determines conclusively which option ought to win out. The decision-maker's choice is therefore simply to be rational or irrational—to fol-

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<sup>86</sup> See Aleinikoff, *supra* note 8, at 962; McFadden, *supra* note 8, at 596; see also text accompanying notes 6–8, *supra*.

<sup>87</sup> See RONALD DWORKIN, A MATTER OF PRINCIPLE 144–45 (1985). Dworkin believes that comparison of conflicting options enables us to decide on the basis of reason: the strongest reason wins out. *Id.* Even when comparison is difficult, or impossible, Dworkin contends, and in principle no choice is demonstrably better than another, we ought still to act as if there is one right answer to the controversy. *Id.*

low reason or ignore it—nothing more. Professor Bernard Williams calls this view “a rationalistic conception of rationality.”<sup>88</sup> It appears to set up a zero-sum game in which one or other of the positions is substantively unreasonable.

This model of rights is appealing because it seems to settle with finality one’s entitlement to reparations. Nevertheless, as any student of jurisprudence or constitutional law should be aware, establishing the relative weight of conflicting rights is certainly not a science or even, I would claim, an art.<sup>89</sup> The “balancing” model of weighing competing rights or interests founders because there may be no final or objective way to determine which interests ought to be included in the balance.<sup>90</sup> Balancing does not provide an independent way of identifying whose interest is to prevail.<sup>91</sup> To extend the “balancing” metaphor, there may be no way—independent of personal or judicial preference—to calibrate the scales, or even to determine what scales we should use. If the scales are not objective, then who decides how to balance the interests? This worry is the basis for the charge that balancing is subject to arbitrariness, and that it may permit the improper (because unbounded) use of discretion or ideology to determine the outcome. Thus, under the individual rights model of morality, certainty proves elusive.

My alternative proposal does not seek to establish the conclusive sort of certainty attempted by the individual rights model. Instead, I propose a vision of moral argument in which reparations is not necessarily asserted as a claim or as imposing an obligation. This theory suggests that morality should be considered as a process of argument—of stating one’s position in relation to another, and elaborating the claims that one can make on the other, or the other can make on oneself. On this vision of moral argument, the goal is to elaborate one’s position relative to another in a dynamic process in which one seeks to determine what claims, excuses, reasons, and justifications you and I are entitled to enter, and what weight they have for us.

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<sup>88</sup> BERNARD WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* 18 (1985).

<sup>89</sup> Aleinikoff, *supra* note 8, at 962.

<sup>90</sup> *See id.* at 972 (“[T]he Court has no objective criteria for valuing or comparing the interests at stake.”).

<sup>91</sup> *See* *Dennis v. United States*, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring) (“Primary responsibility for adjusting the interests which compete in the situation before us of necessity belongs to the Congress . . . . We are to set aside the judgment [of legislators] only if there is no reasonable basis for it.”). In this case, Justice Frankfurter attempted to turn over calibration of the balance’s scale to the legislature, unless the legislature proved wholly unreasonable. *Id.* at 526.

This thought may be elucidated by turning to that staple of legal analogy: games.<sup>92</sup> Professor Stanley Cavell,<sup>93</sup> a prominent philosopher in the ordinary language tradition of J.L. Austin and Ludwig Wittgenstein, suggests that a defining feature of games is that they have rules both to define the various offices occupied by the players or the pieces<sup>94</sup> and to regulate the consequences within the game particular to those offices.<sup>95</sup> To justify a particular move in a game, we may point to the office occupied by the player or the piece, the rules regulating how that player or piece moves, and also the background principles or maxims developed by skilled players of the game that suggest appropriate strategies to play well.<sup>96</sup> Thus, "characterization in terms of definition" will identify positions, moves, arrangements, etc., while "characterization in terms of form ('Whenever A do B', which tells you, *given* a knowledge of the former rules, what must or may be done)" will provide justification within the rules of the game.<sup>97</sup>

This description of the manner in which we justify our actions applies not only to games, but also to morality and law. The essential similarity between justification of our actions both inside and outside of the context of games is that "justifying what is done . . . always presupposes a *particular description* of what was done; under one description it may have been (called) dishonest, under another, courageous."<sup>98</sup>

<sup>92</sup> See Charles Yablon, *On the Contribution of Baseball to American Legal Theory*, 104 YALE L.J. 227, 227-29 (1994) (demonstrating how game rules, specifically baseball rules, are useful in understanding American legal theory).

<sup>93</sup> Walter M. Cabot Professor of Aesthetics and the General Theory of Value at Harvard, Emeritus.

<sup>94</sup> What is a batter or a pitcher; what is a rook or a pawn; what is a king or an ace; who holds the rope and who skips.

<sup>95</sup> See STANLEY CAVELL, *THE CLAIM OF REASON* 305 (1979) [hereinafter, CAVELL, *THE CLAIM OF REASON*]. In baseball, such rules include where the batter stands, how the batter moves around the bases, how the batter scores or is given out, what constitutes a pitch, a strike, a ball, etc.; in chess, how the pieces move, etc. In skipping, there may be a number of different rules depending on the complexity of the skipping game. At its simplest, the skipper cannot keep counting skips towards his or her total if he or she gets tangled in the rope.

<sup>96</sup> *Id.* at 306. In games, not every move is determined by the rules: "[A] certain mastery of a game is required in order to be said to play [a] game at all. A knowledge of every competitive game . . . i.e., every game for which there *are* principles of play, requires an understanding of its principles as well as a knowledge of its defining rules." *Id.* at 304. Thus, there are plays in baseball and moves in chess that are determined by the state of the game and the standard optimal responses to what the opponent is doing. Here, a justification in terms of the defining or regulatory rules may not answer a question about the appropriateness of a given move.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

Nonetheless, in morality, in contrast to games and the law, there are no defining rules.<sup>99</sup> We cannot appeal to express rules to define the relevant roles we are to occupy. Thus, one may treat a friend differently than a stranger:<sup>100</sup> defining these roles is not, however, accomplished in terms of an appeal to particular published rules of friendship or stranger-hood. Each individual is equally authoritative in defining his or her offices and moves—that is, the roles the individual characterizes others, as well as him or herself, as holding.

Law appears to be more akin to games than to morality in terms of providing express rules that define and regulate action. Legal rules often operate not to tell us, prospectively, what to do, but to define what facts and acts are relevant to a given issue, characterize those facts in a legally acceptable manner, position legal actors in relation to other agents, and define the consequences of that position. In so doing, law provides a standard by which to measure ourselves and our behavior. As Professor Honoré suggests:

The law is concerned with the relations between human beings and between them and animate or inanimate objects viewed from a special point of vantage. To attain this point of vantage requires the transformation of the data of ordinary life into those of a special drama with its own personages, costumes and conventions . . . . To set the stage for this drama the law categorizes actions, events, personalities, and conditions in a special way and then, from their subsumption in to the appropriate category, draws conclusions as to the legal position of the *dramatis personae* and *res*, their possibilities of acting and suffering, and their mutual relations. The various types of law are concerned with the parts of the dramatic dialectic.<sup>101</sup>

In law, as in games and morality, our actions do not come ready labeled. There may be room to dispute how to characterize a legally-

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<sup>99</sup> See, e.g., STANLEY CAVELL, *CONDITIONS HANDSOME AND UNHANDSOME: THE CONSTITUTION OF EMERSONIAN PERFECTONISM* 113–14 (1990) [hereinafter CAVELL, *CONDITIONS*] (“In the moral life the equivalent finality is carried . . . by *judgment* of moral finality . . . one whose resolution is not settled by appeal to a rule defining an institution.”).

<sup>100</sup> It is precisely this difference that makes pre-nuptial agreements such an awkward device in a relationship: a pre-nuptial agreement broaches stranger-hood on the eve of a deep commitment to intimacy. To settle the agreement, one must often engage in the sort of arms-length bargaining that characterizes much of contract law.

<sup>101</sup> A.M. Honoré, *Real Laws*, in *LAW, MORALITY, & SOCIETY: ESSAYS IN HONOR OF H.L.A. HART* 99, 112 (P.M.S. Hacker & Joseph Raz eds., 1977).



relevant act,<sup>102</sup> and such a disagreement may (but need not) be morally or legally important. Whether the different ways we characterize an act make a difference to an individual's moral or legal status will depend upon the options available to explicate the act in terms of the justifications, excuses, and other "elaboratives"<sup>103</sup> open to the actor. For example, whether an act is determined to be one of borrowing or stealing may have different moral or legal consequences, though the act may (but need not) be substantially the same in both cases.

This ability to re-describe or re-label acts is especially important for the law, which tends to "channel" (as Professor Fuller would put it)<sup>104</sup> "ordinary" actions into legal categories. That is, the law often re-conceptualizes acts that can be described in everyday language utilizing everyday concepts into specifically legal institutions such as tort, contract, testation, trusts, marriage, and divorce.<sup>105</sup> Furthermore, it is readily apparent in the legal context (but equally important in the moral or political context) that these characterizations may also determine an agent's or act's relevance or importance: it is usually irrelevant for purposes of describing the act of stealing whether the agent is an actress, a violinist, or a waiter—even though the agent may describe him or herself primarily in these terms. Thus, the significance of a particular description may include not only the available justifications, but also what are to be the consequences of such a decision.

I suggest that the disagreement over the characterization of an act in a moral context is significant because it raises the question of the continuation of our community. That is, through our disagreements over the characterization of our acts, we sometimes discover that we evaluate the meaning of our acts using different schemes of valuation and that adhering to one or other scheme has consequences for the manner in which we regard ourselves or other people.<sup>106</sup> On this view, what matters for one person might not matter for another, and vice versa. In the end, both persons might be right because they may be working with separate, incommensurable schemes

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<sup>102</sup> See generally G.E.M. ANSCOMBE, *INTENTION* (2d ed. 1976) (providing perspective on the concept of action and a reason for acting).

<sup>103</sup> See generally STANLEY CAVELL, *MUST WE MEAN WHAT WE SAY?* (1976).

<sup>104</sup> See Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 801-03 (1941) (explaining that law, like language, calls on people to channel their experiences into particular forms "for the legally effective expression of intention").

<sup>105</sup> Neil MacCormick, *Law as Institutional Fact*, 90 L.Q. REV. 102, 105 (1974).

<sup>106</sup> So, adopting a particular scheme may permit or preclude us from adopting a particular characterization of ourselves or our acts, or others or their acts.

of valuation.<sup>107</sup> Thus, the issue is whether we can respect the other's scheme of valuation, and if so, how.

To illustrate this point, it is helpful to draw upon one of the most intriguing recent discussions of race—that proposed by Professor Patricia Williams, a well known scholar on critical race theory. Williams attempts to chart the consequences of what is sometimes called “ignorance” in ordinary dialogue.<sup>108</sup> For example, one of Williams's friends believed her boyfriend was overly frugal: as the friend described him, he “ha[d] a bit of the Jewish in him.”<sup>109</sup> When Williams objected to that characterization as having “harmful implications,” the friend first apologized but maintained through her characterizations of what she meant to say that she believed “stinginess was a Jewish ‘thing.’”<sup>110</sup>

As we argued, words like “overly sensitive” . . . and “touchy” began to creep into her description of me. She accused me of building walls . . . I tried to reassure her that . . . I had not meant to attack or upset her, and that I deeply valued her friendship. But . . . I felt our friendship being broken apart. She would be consoled with nothing less than a retraction of my opinion . . . She didn't want me to understand

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<sup>107</sup> See JOSEPH RAZ, *THE MORALITY OF FREEDOM* 322 (1986) (“A and B are incommensurate if it is neither true that one is better than the other nor true that they are of equal value.”); see also MICHAEL STOCKER, *PLURAL & CONFLICTING VALUES* 169 (1990) (explaining that pluralists recognize “that choice importantly involves determining which values to pursue and which to forego” while monists “tell us that these choices and all other choices are to be made simply on the basis of pleasure”).

<sup>108</sup> See PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE & RIGHTS* 64, 84–91, 125, 166 (1991) [hereinafter WILLIAMS, *ALCHEMY*]; WILLIAMS, *supra* note 30, at 118–19. To my mind, Williams is the legal chronicler par excellence of these moments in which individuals feel slighted and no longer able to sustain a conversation. She is not the only or best known one. See, e.g., JAMES BALDWIN, *Down at the Cross: A Letter from a Region in My Mind*, in *THE FIRE NEXT TIME* 29, 69–70 (1963) (describing a bartender's refusal to serve him at a bar and the ensuing conversation with and hurt feelings of a white bystander). Williams's examples of the various responses elicited through racial dialogue are not simply her racially or politically loaded interpretations of these conversations or discussions; rather, they are examples of what Wittgenstein might call “language games”; they are examples of everyday or ordinary language usage that chart what might be called the “implications” entailed by the use of a word or concept in a particular context. See CAVELL, *supra* note 103, at 9. Her project in *The Alchemy of Race and Rights* has, I would suggest, much in common with the goals of ordinary language philosophy. See *id.* at 3–16 (describing ordinary language philosophy and its interests and techniques).

<sup>109</sup> WILLIAMS, *ALCHEMY*, *supra* note 108, at 125.

<sup>110</sup> *Id.*

merely that she meant no harm, but wanted me to confess that there was no harm.<sup>111</sup>

Williams's example demonstrates how two individuals can fight over the characterization of their words and acts, and how these competing characterizations draw on values that are embedded in our discourse on race and are likely to resurface in uncomfortable ways.<sup>112</sup> More importantly, perhaps, her discussion elaborates upon how the refusal to acknowledge the other's point of view has serious consequences for continuing to exist "in community" with each other: a relationship is damaged, perhaps irreparably, and a conversation on race and religion is shattered.<sup>113</sup> Professor Cavell considers this breakdown of community exemplified in the circumstances presented in Hendrik Ibsen's play *A Doll's House*,<sup>114</sup> when the heroine, Nora Helmer, refuses to accept the constraints placed upon her humanity by her role as a wife. Cavell suggests that Nora is unable to express adequately her dissatisfaction with the terms in which her husband, Torvald, frames the discussion (the values he espouses) precisely because the sorts of reasons she advances are not reasons he can, or would accept.<sup>115</sup> In this sort of situation Nora feels slighted (they both do), conversation has broken down, reasons have run out. Torvald is apt to characterize her "as a foolish child and as out of her senses, as if she is to blame for the [moral, emotional, etc.] shipwreck, as if it exists only if she says it does."<sup>116</sup> And Nora's response is to insist that she is not the person Torvald thought she was; she has changed, moved on, past his comprehension.<sup>117</sup>

In this sort of situation, there are no additional reasons that can persuade the participants of the other's good faith, or that they ought

<sup>111</sup> *Id.*

<sup>112</sup> The idea that conflicts between values can remain unresolved and recurring in different contexts may be explained by adopting Duncan Kennedy's concept of "nesting." Nesting is "the reproduction of the particular argumentative oppositions within the doctrinal structures that apparently resolve them." Duncan Kennedy, *A Semiotics of Legal Argument*, 42 SYRACUSE L. REV. 75, 112 (1991).

<sup>113</sup> Understanding is replaced by confrontation: Williams's friend's inability to admit a wrong engendered an insecurity that could only be remedied by Williams's admission of wrongdoing. This is an all too human situation.

<sup>114</sup> HENDRIK IBSEN, *A DOLL'S HOUSE* (Charlotte Barclund trans. 1996).

<sup>115</sup> See CAVELL, *CONDITIONS*, *supra* note 99, at 113; IBSEN, *supra* note 114, at 96-106.

<sup>116</sup> CAVELL, *CONDITIONS*, *supra* note 99, at 113.

<sup>117</sup> Cavell's focus on "comedies of remarriage" elaborates how these relationships can be recovered. See STANLEY CAVELL, *PURSUIITS OF HAPPINESS: THE HOLLYWOOD COMEDY OF REMARRIAGE* 189-228 (1981) [hereinafter CAVELL, *PURSUIITS OF HAPPINESS*] (discussing the film *Adam's Rib*).

to converse again. There are no reasons because everything that could be said, has been said: it is not as if one does not know what the other is saying, or has misunderstood it so that something more can be said to clarify the issue. Instead of *saying* something, what is required is that something be *shown*: what Malcolm X would call respect; what Cavell calls equality.<sup>118</sup> While we cannot prove the fact of our community, one way to express it—perhaps the only way—is to enact it, by responding to or acknowledging the other as an equal.

What emerges from this discussion is a vision of morality that does not depend upon demand but upon what might be called “conversation.”<sup>119</sup> Morality is considered as a process of argument where disagreements emerge over the characterization of our acts and what such a characterization ought to mean to oneself or to others. Disagreement becomes significant when our continued community matters, and we are challenged to find ways in which to respect each other’s different schemes of valuations. Sometimes acknowledgment of our respective positions is all that is required. Sometimes some greater reckoning is warranted before we can find a way to “go on” together. Which is which may not be obvious at the outset and may change as our conversation progresses.

#### IV. FITTING REPARATIONS WITHIN THE “CONVERSATIONAL” MODEL

Having outlined the contours of the conversational framework, we can now apply it to reparations claims. Simply put, the conversational model, as compared to the confrontational model of individual rights, offers a better means of satisfying reparations claims.

Reparations arguments may be considered as one of the ways of re-characterizing acts or situations in ways that are morally or politically significant. The claims made through reparations are useful, in part, by ruling out certain arguments from the get-go as having the weight others wish to put on them. Thus, if reparations succeeds in tracing the underdevelopment of African Americans by whites, certain notions of desert and failure, responsibility and innocence, are ruled out of the debate on race, discrimination, and their consequences for American society.<sup>120</sup> Here, the question becomes one of

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<sup>118</sup> CAVELL, *THE CLAIM OF REASON*, *supra* note 95, at 23.

<sup>119</sup> That is, “conversation” in the fullest sense of that term, in which people not only talk, but listen and respond.

<sup>120</sup> The long history of racial discrimination has severely disadvantaged African Americans to the benefit of white Americans, as argued by the NAACP in its brief in *Grutter v.*

community: whether we can find a common set of valuations that enable us to evaluate the significance of our acts. This issue of common valuations may be more or less fateful, depending upon how important we hold the acts or claims or definitions to be—whether one of us finds them so important that we are willing to risk our relationship over it.<sup>121</sup> This was President Lincoln's question;<sup>122</sup> it was also, perhaps, Malcolm X's. It remains a valid one today: the more so in light of the claim that, in the face of international terror, this is a nation that wishes to stand united.<sup>123</sup> Reparations helps interrogate what is to be the content of that unity.

To make this rather cryptic assertion somewhat more concrete, consider the following hypothetical. Suppose Justice Scalia takes his usual position and, from an individual rights perspective, points out that his family came to America after the end of slavery and is therefore not responsible for any acts of discrimination.<sup>124</sup> People in that position can plausibly claim not only that reparations advocates are seeking to hold them accountable for the acts of now dead people, but that those now dead people bear no relation to them, morally or personally. While this individual rights argument is valid in itself, the appropriate response, from the perspective of the conversational model, is not to answer in kind, but to change gear. One answer is to suggest that white people are collectively responsible for the wrongs

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*Bollinger.* See Brief for the NAACP Legal Defense and Education Fund, Inc. at 21-22, *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003) (No. 02-214). Reparations seeks to build upon the types of arguments advanced by the NAACP by identifying specific instances in which discrimination harmed specific individuals, and by forcing America to confront the reality of discrimination and the millions of lives it has affected.

<sup>121</sup> See generally CAVELL, PURSUITS OF HAPPINESS, *supra* note 117 (discussing seven films about the "comedy of remarriage").

<sup>122</sup> See William Michael Treanor, *Learning from Lincoln*, 65 *FORDHAM L. REV.* 1781, 1781-86 (1997) (discussing the relation of slavery and nation in Lincoln's interpretations of the United States Constitution); see also LOIS J. EINHORN, *ABRAHAM LINCOLN THE ORATOR* 151-66 (Address at Cooper Institute, New York, 1860), 169-76 (First Inaugural Address, 1861), 179-80 (Second Inaugural Address, 1865) (1992). In all these speeches, Lincoln is keenly aware of the extent to which toleration of slavery and the survival of the Union are intermingled.

<sup>123</sup> The phrase "united we stand" has assumed particular significance in the months after the September 11, 2001 attacks on New York and Washington, D.C. See Susan Sontag, *Real Battles and Empty Metaphors*, *N.Y. TIMES*, Sept. 10, 2002, at A25.

<sup>124</sup> See, e.g., Antonin Scalia, *The Disease as Cure*, in 2 *AFFIRMATIVE ACTION & THE CONSTITUTION* 83, 88 (Gabriel Chin ed., 1998) (emphasizing that early ethnic white immigrants, including his father, suffered discrimination but also conceding that some of these immigrants practiced, and indeed, benefited from discrimination).

of slavery.<sup>125</sup> Yet, this may not entirely capture the claim being entered here. While it is certainly possible to suggest that African Americans suffer a “group harm” as a result of the continuing perpetuation of the “badges and incidents” of slavery, and while it is also true that whiteness conveys benefits not available to African Americans, that is not to say that whites are obligated to redress the balance by virtue of the benefit alone.

The real issue emerges when we apply the conversational model rather than the confrontational one to reparations arguments. The question becomes one of what to do in the face of a history of discrimination. Who bears responsibility for redeeming that past, and what are the consequences of failing to address it? Thoreau, addressing a similar problem in his essay *Civil Disobedience*, suggested that:

It is not a man's duty, as a matter of course, to devote himself to the eradication of any, even the most enormous wrong; he may still properly have other concerns to engage him; but it is his duty, at least, to wash his hands of it . . . . If I devote myself to other pursuits and contemplations, I must first see, at least, that I do not pursue them sitting upon another man's shoulders. I must get off him first, that he may pursue his contemplations too.<sup>126</sup>

The sort of reparations argument I have in mind seeks to account for one's present position by looking at how we got here. It asks how we are to account for our present positions—did we get here by divine providence or blind luck alone, or must we acknowledge other factors?<sup>127</sup> Reparations seeks to point to the ways in which modern America benefited from *de jure* and *de facto* discrimination. At the least, it rules out the argument that “I made it on my own.” It precludes the sort of social and economic isolationist or social Darwinist foundation upon which such arguments appear to rest and emphasizes the lingering effects that the roles slavery and segregation played in establishing the relative social inequality of African Americans as compared to other racial or ethnic groups. Reparations as a moral argument, at its

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<sup>125</sup> This is certainly what Horowitz takes reparations to claim. See Horowitz, *supra* note 3, ¶ 2. It is also reminiscent of the “They Owe Us” rallying cry of certain reparations activists. See Jenkins & Harris, *supra* note 2, at C1.

<sup>126</sup> Henry David Thoreau, *Civil Disobedience*, in *WALDEN & CIVIL DISOBEDIENCE* 16, 23 (Paul Lauter ed., 2000).

<sup>127</sup> See generally STANLEY CAVELL, *THE SENSES OF WALDEN: AN EXPANDED EDITION* (1992) (providing compelling insight into Thoreau's *Walden*).

minimum, makes it impossible for citizens to ignore the contribution of slavery and of de jure segregation to the character of our society. Thoreau's suggestion that we must at least "wash our hands" of this "enormous wrong" suggests that some affirmative act must be taken to expiate that past. And it raises the question of how successful hand-washing can be for avoiding or repudiating responsibility for the community's act—how we can distance ourselves from the wrongs of others. There is, I believe, no systematic answer to this question.

One way to address the issue, however, is to recognize that the reparations debate is, in part, over how we as a nation participate in our life together, particularly through our national institutions.<sup>128</sup> Reparations points out that these institutions were founded upon discrimination, demands that we not ignore this fact but finally acknowledge it, and attempts to account for how even those who do not want to act can "wash their hands," in Thoreau's words, of this country's sponsorship of slavery and discrimination. Thoreau's metaphor is appropriate, I believe, because it suggests the necessity of some form of atonement, or reckoning, or—in Dr. Martin Luther King's words—redemption.<sup>129</sup> King's question was whether and how America was going to use the civil rights movement to redeem itself: it remains a valid question today.<sup>130</sup>

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<sup>128</sup> See ROBINSON, *supra* note 6, at 3–6; see also Ogletree, *Repairing the Past*, *supra* note 41, at 282–83 (citing Robinson).

<sup>129</sup> Martin Luther King, Jr., *Facing the Challenge of a New Age*, in *I HAVE A DREAM: WRITINGS AND SPEECHES THAT CHANGED THE WORLD* 14, 22 (James Melvin Washington ed., 1992); see also Ogletree, *Repairing the Past*, *supra* note 41, at 283–84 (discussing Dr. King's notion of redemption). James Baldwin also employed the notion of a redemptive remaking of America, counseling his nephew, James:

[T]hese [white] men are your brothers—your lost, younger brothers. And if the word *integration* means anything, this is what it means: that we, with love, shall force our brothers to see themselves as they are, to cease fleeing from reality and begin to change it . . . . [W]e can make America what America must become.

JAMES BALDWIN, *My Dungeon Shook: Letter to My Nephew on the One Hundredth Anniversary of the Emancipation*, in *THE FIRE NEXT TIME* 15, 23–24 (1963).

<sup>130</sup> This idea of redemption is intimately related to King's idea of a "beloved community," by which he meant "the reconstruction of a social reality based on a radically different assessment of human potential." Anthony E. Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*, 103 *HARV. L. REV.* 985, 988, 1038–41 (1990). The socially inclusive nature of this redemptive enterprise can be seen as early as King's leadership during the Montgomery Bus Boycott of 1955–56. Randall Kennedy suggests that King "emphatically portrayed the boycott as a more ambitious and inclusive undertaking [than an expression of African-American solidarity and pride]. 'We are not struggling merely for the rights of Negroes,' he declared one evening at a MIA prayer

The stakes in this issue are high. To fail to acknowledge and account for America's history is to ignore and reject the past and continuing experiences of a huge segment of the population and to perpetuate the treatment of African Americans as somehow less worthy or interesting than other citizens.<sup>131</sup> To do so is literally and metaphorically to split the nation, which is the defining problem for both Abraham Lincoln and, in a different way, for Malcolm X.

Lincoln can be regarded as dealing with the moral and political consequences of keeping a nation whole: Malcolm X with tearing it apart. Lincoln's concern was to read—or rather, re-read—the Constitution in a manner that remained consistent with the dual aspirations of national unity and the rejection—or at least, containment—of slavery.<sup>132</sup> Lincoln combined literalist and idealist readings of the Constitution, first to calm southern fears that he would emancipate slaves on his accession to the presidency, while at the same time assuaging the northern abolitionist demand that slavery be contained to those states in which it currently existed.<sup>133</sup> He developed his idealist reading of the Constitution during the Civil War, re-orienting the Constitution in light of new principles he took as fundamental to the American experience: full equality for all *people*, derived from a democratic government that is of, by, and for those people.<sup>134</sup> By the end of the Gettys-

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meeting, "We are determined to make America a better place for *all* people." Randall Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 YALE L.J. 999, 1024 (1989) (citation omitted).

<sup>131</sup> See, e.g., Randall L. Kennedy, *McClesky v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1417 (1988) (discussing the Supreme Court's "racially selective patterns of emotional response"). Professor Ogletree has elaborated on the significance of these emotional responses for reparations in two recent articles. See Ogletree, *The Current Reparations Debate*, *supra* note 72, at 1057; Ogletree, *Repairing the Past*, *supra* note 41, at 279, 281–85.

<sup>132</sup> Lincoln was certainly far from endorsing the social equality of African Americans before the outbreak of the Civil War. By 1862, Lincoln still officially entertained the idea of relocating freed African Americans to Central America, at least as a means of giving them the social equality he believed they could not attain in America. See Abraham Lincoln, *Address to a Deputation of Colored Men* (Aug. 14, 1862), in CLASSICAL BLACK NATIONALISM: FROM THE AMERICAN REVOLUTION TO MARCUS GARVEY 209, 210–11, 212 (Wilson Jeremiah Moses ed., 1996). Moreover, Congress had appropriated \$600,000 for that purpose. *Id.* at 209.

<sup>133</sup> See Treanor, *supra* note 122, at 1782–84.

<sup>134</sup> See *id.* at 1784–85. Lincoln's reference to people, rather than citizens, reflects this inclusiveness, neatly sidestepping (and thereby rendering irrelevant) the central reason for claiming that slaves have no rights, articulated in *Dred Scott v. Sandford*, 60 U.S. 691, 19 How. 393 (1856).



burg Address,<sup>135</sup> Lincoln had re-orientated the nation to a new concern with the shared humanity of all individuals, and:

Equality—nowhere mentioned in our unamended Constitution—bec[a]me the fundamental commitment of the constitutional order. Garry Wills has written that Lincoln “cleanse[d] the Constitution—not, as William Lloyd Garrison had, by burning an instrument that countenanced slavery. He altered the document from within, by appeal from its letter to the spirit, subtly changing the recalcitrant stuff of that legal compromise, bringing to it its own indictment.”<sup>136</sup>

By the time of the second Inaugural Address, Lincoln recognized that the people’s task was to continue “the work we are in; to bind up the nation’s wounds,” but saw this task as intimately related to atoning as a nation for the wrongs of slavery.<sup>137</sup>

For Malcolm X, the separate and lower status of African Americans precluded politicians, and in fact all citizens, from claiming to speak as representative Americans on behalf of the nation. For how can we talk of an America generally defined in terms of its freedom-protecting institutions when African Americans are excluded from it? Famously, Malcolm X interrogated the consequences of continuing to deny African Americans equal status, utilizing the metaphor of diners at a table: “I’m not going to sit at your table and watch you eat, with nothing on my plate, and call myself a diner. Sitting at the table doesn’t make you a diner, unless you eat some of what’s on that plate.”<sup>138</sup> For Malcolm X, the perpetuation of the resentment engendered by second-class citizenship led down the road to another civil war, the explosion of a racial

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<sup>135</sup> EINHORN, *supra* note 122, at 177–78 (Gettysburg Address, 1862).

<sup>136</sup> Treanor, *supra* note 122, at 1784.

<sup>137</sup> EINHORN, *supra* note 122, at 180 (Second Inaugural Address, 1865). Lincoln’s judgment that the Civil War could be regarded as divine retribution for the *national* sin of slavery is famously expressed in that speech:

[If] all the wealth piled by the bondsman’s two hundred and fifty years of unrequited toil shall be sunk, and until every drop of blood drawn with the lash shall be paid by another drawn with the sword, . . . so still must it be said the judgments of the Lord are true and righteous altogether.

*Id.*

<sup>138</sup> Malcolm X, *The Ballot or the Bullet, Address Before the Cory Methodist Church* (Apr. 3, 1964), in MALCOLM X: SELECTED SPEECHES AND STATEMENTS 26 (George Breitman ed., 1965).

powder keg.<sup>139</sup> To continue to live under such circumstances was, Malcolm X believed, so destructive of all Americans' humanity that, for a time, he believed the only solution was separation into different nations.<sup>140</sup> Malcolm X's late turn to a focus on human rights offers hope that even the most ardent nationalist can recognize the possibility of racial reconciliation based upon respect for a common humanity in a transformed, "redeemed" America.

One of the greatest challenges facing reparations activists is persuading the majority of Americans that a conversation on race and society, responsibility and redemption, is still necessary. Many African Americans feel the need for such a dialogue but are still unconvinced that asking for reparations is the best way to initiate it. My response is, in part, to agree: if reparations remains a confrontational demand for money from individual whites, then it has no chance of promoting anything other than a shouting match. If reparations is presented as a means of accounting for our responsibilities as citizens to each other and then acknowledging those responsibilities, perhaps by living up to them, then I think the reparations conversation could be both positive and fruitful.

Is litigation the best place to start such a conversation? I do not think so. Litigation lends itself to the confrontational model—after all, that is what the bilateral structure of rights is all about. It may even be that the whole point about "correlativity" is to function as a device to weed out the types of claims that ought to be promoted through the legal system as opposed to those that should not.<sup>141</sup> Nonetheless, a conversation has to start somewhere, and as all jilted lovers know, there is never any good time nor good way in which to start a conversation one does not want to hear. We have tried activism, social pressure, and legislation. None has proved an unqualified success. Where

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<sup>139</sup> See Malcolm X, *America's Gravest Crisis Since the Civil War*, in MALCOLM X: THE LAST SPEECHES 59, 62–63 (Bruce Perry ed., 1989).

<sup>140</sup> It is clear that Malcolm X thought that second-class citizenship undermined African Americans' humanity. I would suggest that Malcolm X's description of whites as "devils" also expressed the inherent inhumanity of those who perpetuated the systematic exclusion of African Americans either actively or by acquiescence. This is certainly James Baldwin's reading of that theology: "[O]ne did not need to prove to a Harlem audience that all white men were devils. They were merely glad to have, at last, divine corroboration of their experience, to hear . . . that they had been lied to for all these years and generations." JAMES BALDWIN, *Down at the Cross: Letter from a Region in My Mind*, in THE FIRE NEXT TIME 25, 64 (1963).

<sup>141</sup> This suggestion was made to me by Professor Kenneth Mack of Harvard Law School. It comports with Professor Hylton's argument that litigation is ineffective to promote welfare claims. See Hylton, *supra* note 29, at 32–36.

activism and legislation have failed, as in Oklahoma, then the only option left, it seems, is litigation. If litigation manages to start a conversation, even though it fails in the short term, it will have succeeded in the long term. The danger, of course, is that by resorting to litigation the only possible conversation is one that is somewhat forced, with all the resentment that engenders.

#### CONCLUSION: REPARATIONS AND RECKONINGS

Reckoning—acting on our mutual obligations to each other as fellow citizens and fellow humans—which I have suggested comports with Dr. King’s notion of redemption, provides, I believe, the single most positive aspect of reparations: the opportunity for diverse and fractured communities to reconstruct themselves through a forward-looking act designed to overcome past inequity. One does not have to have committed a wrong to jump on that bandwagon. It situates the moral obligation for reparations not in a particularized claim—a duty owed by one individual (or his/her descendants) to another (or his/her descendants) on the basis of past mistreatment—but in the more general recognition that we all have a duty to help those who have suffered, that such suffering is through no fault of their own but rather attributable to institutional discrimination, and that the perpetuation of such suffering diminishes us as a community.

Thus, the “confrontationalist” argument fails because, on this model, something more than payment is needed. Instead, what is required is a renewed orientation towards America and Americans that permits what Professor Loury has called, in a recent speech, the discovery of intimacy between the races: the ability of all Americans to think of each other as intimates.<sup>142</sup>

The only way that we can find out what troubles another person is to continue to converse with her and to respect what she says—to treat her as an equal. This may require making amends for some unintended slight that one has given the other on a previous occasion or acknowledging the existence of inequalities for which one is not personally responsible. To continue our national conversation, the conversation of how we are to be a nation at all, may require us to begin the process of charting on what terms we can begin conversation anew. I think Abraham Lincoln, Malcolm X and Dr. Martin Luther

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<sup>142</sup> Glenn Loury, Speech at Harvard Law School Saturday School (Nov. 6, 2002) (Harvard Video Archive) (speaking about his book: *The Anatomy of Racial Inequality*), available at [http://www.law.harvard.edu/students/saturday-school/video\\_archive.shtml](http://www.law.harvard.edu/students/saturday-school/video_archive.shtml).

King, each in their different ways, undertook this task. If we are truly to be a nation united then we need to find a way to follow their example. Reparations, I believe, is an excellent place to start.

