STUDENT WORKS

THE LEESBURG STOCKADE GIRLS: WHY MODERN LEGISLATURES SHOULD EXTEND THE STATUTE OF LIMITATIONS FOR SPECIFIC JIM-CROW-ERA REPARATIONS LAWSUITS IN THE WAKE OF *ALEXANDER v. OKLAHOMA*

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I. INTRODUCTION

A. The Leesburg Stockade Girls

Bleeding, battered, many missing shoes or other articles of clothing, the girls, some as young as ten, none older than sixteen, were stolen away under the cover of nightfall, hauled out of town, and secretly transferred to a dilapidated stockade in a remote corner of the countryside.[1] There they would be held, under lock and key and at gunpoint, for forty-five days without proper meals,

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1. Donna M. Owens, *Stolen Girls*, 37 Essence 2 (June 1, 2006) (available on Lexis, News & Business library, ESSENC file).

water, sanitation, beds, or medical treatment.[2] This is not the story of human-rights violations in an unstable, war-torn nation in some far off corner of the world. It is the story of a group of now grown women dubbed the Leesburg Stockade Girls, who, as adolescents in Americus, Georgia, at the height of the Civil Rights Movement, were arrested during peaceful demonstrations and held, some for nearly two months, in deplorable, inhumane conditions despite their youth and vulnerability.[3]

Their story began on July 19, 1963, during a Student Nonviolent Coordinating Committee (SNCC) demonstration aimed at peacefully desegregating the local Americus movie theater.[4] Demonstrators at the theater were met with the typical police threats of the day: powerful fire hoses, trained attack dogs, club-wielding policemen,[5] and mass arrests.[6] One of the girls, LuLu Westbrooks-Griffin (LuLu),[7] was swept off her feet by a blast from a fire hose, only to rise to her feet to be clubbed over the head by a baseball bat-swinging officer three times her size, a blow which created a gaping wound that would not receive medical attention for over a month.[8] Ultimately, the protestors were taken into custody and shipped off to various jails, and the following night many of the girls were secretly whisked away to a small Civil War-era stockade several miles outside of town in Leesburg, where their nightmare really began.[9]

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2. *Id.*

3. *Id.*

4. *LuLu and the Girls of Americus, Georgia 1963: A Civil Rights Story in Their Own Words* (Mirus Video Productions 2003) (documentary) [hereinafter Documentary]. The Author would like to thank the filmmaker and producer, Richard J. McCollough, for generously agreeing to make this work available.

5. One of the girls also recalls the prototypical use of electric cattle prods on demonstrators that day. Interview by Prof. Raymond Arsenault with Carol Barner-Seay, Leesburg Stockade Girl (June 9, 2006).

6. Documentary, *supra* n. 4.

7. When possible, the women's current names, as opposed to their childhood names, have been used.

8. Documentary, *supra* n. 4.

9. *Id.* The girls, of course, had no idea where they were at the time, Interview with Carol Barner-Seay, *supra* n. 5, which was probably a good thing. Carol Barner-Seay recalls that violence against blacks was so prevalent in the small Georgia town that it was commonly referred to as "Lynchburg." *Id.* Indeed, lynching was very common in Georgia during at least the first part of the twentieth century. *See generally* W. Fitzhugh Brundage, *Lynching in the New South: Georgia and Virginia 1880–1930* (U. Ill. Press 1993) (discussing the prevalence and violent nature of lynching in Georgia around and after the turn of the century). One of the girls recalls seeing a charred, lynched corpse on the outskirts of

More than thirty girls were held in a small twelve-foot by forty-foot cell.[10] It would be two days before the girls were fed, and even then meals primarily consisted of relatively raw hamburger meat[11] and egg-salad sandwiches that were more mayonnaise than egg.[12] These meals, though initially welcomed given the girls' hunger, quickly became the cause of additional suffering as many were plagued by diarrhea and vomiting during their stay in the stockade.[13] Because the only toilet in the cell was broken and would not flush, feces soon overflowed the bowl and piled onto the floor,[14] leaving the girls only empty hamburger cartons with which to relieve themselves, receptacles that were then stacked in the corner, contributing to the stockade's overall stench.[15] Many of the girls were passing through puberty, and without sanitary napkins, they were forced to tear shreds of their clothing apart to use for feminine hygiene.[16] Adding to the smell was a drain in the floor the girls were forced to squat over when urinating. The drain was located below their only source of water, a broken showerhead that slowly dripped warm water, making it difficult to quench their thirst in the Georgia summer heat and utterly impossible to bathe.[17] Recalls LuLu, "I will never forget the stench of the smell of our bodies. Months after I got home, I kept on taking baths to get the stink off me. The smell of that stockade stayed in my nostrils for quite some time."[18]

They slept on the concrete floors because the only mattresses were soiled bunks fit only for use as makeshift toilets.[19] Mosqui-

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Americus during her childhood. Documentary, *supra* n. 4.

10. Owens, *supra* n. 1.

11. LuLu Westbrooks-Griffin, *Freedom Is Not Free: 45 Days in Leesburg Stockade* 22 (Heirloom Publg. 1998). The Author would like to thank Mrs. Westbrooks-Griffin not only for making this valuable source available but also for having the courage to make her story public.

12. Interview with Carol Barner-Seay, *supra* n. 5.

13. Owens, *supra* n. 1.

14. *Id.*

15. Westbrooks-Griffin, *supra* n. 11, at 22.

16. Owens, *supra* n. 1. For one girl, Verna Hollis, who was fifteen at the time, feminine hygiene was not a problem. It was in this place that she learned she was pregnant because her menstruation cycle failed to begin and she was continuously sick to the point of vomiting. *Id.*

17. *Id.* Weeks into their captivity, the girls, over thirty in total, were finally given two tin mugs with which to collect water. Westbrooks-Griffin, *supra* n. 11, at 22.

18. Westbrooks-Griffin, *supra* n. 11, at 18.

19. Owens, *supra* n. 1.

toes, ticks, and lice wandered through the barred windows with broken glass, constantly feeding upon the girls, and at night, attempting to find solace in sleep, they would often awaken to find cockroaches crawling across their skin.[20] At one point a guard threw a rattlesnake into the girls' cell, where it stayed all night, sounding its poisonous warning.[21] Through the bars, guards would poke at the girls with sticks, hurling racial epithets and threats.[22] "They told us that we'd be taken out one by one and killed," remembers a then fourteen-year-old Barbara Jean Daniels.[23]

Girls came and went from the stockade, but ultimately some, including LuLu, were held there for forty-five days in these conditions.[24] Their captivity might have gone on much longer had it not been for a young Jewish SNCC photographer[25] from Chicago, who learned of the girls' whereabouts and, while the guard was distracted, took several breathtaking photographs[26] of the girls behind bars and then smuggled the developed images to SNCC's Atlanta headquarters.[27] Shortly thereafter, the girls were released, having spent forty-five days in the stockade.[28] They were in bad shape; LuLu, for example, lost ten pounds and had a serious ear infection.[29] Somehow, the pictures would eventually make

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20. *Id.*

21. Westbrooks-Griffin, *supra* n. 11, at 23. Thereafter, in the middle of the night, one girl would routinely wake in a panicked state, screaming until the others awoke and comforted her. Documentary, *supra* n. 4.

22. Westbrooks-Griffin, *supra* n. 11, at 23. "They called us pickaninnies, stupid niggers[,] and jungle bunnies." *Id.*

23. Owens, *supra* n. 1. Indeed, the girls were, from time to time, taken out, one at a time. LuLu recalls one girl secretly telling her she had been raped during one of these isolated removals. Documentary, *supra* n. 4.

24. Owens, *supra* n. 1.

25. The life and experiences of the photographer, Danny Lyon (including his encounter with the girls), are well documented in his autobiographical, photo-essay memoir, entitled *Memories of the Southern Civil Rights Movement* (U.N.C. Press 1992).

26. Images of the girls in the stockade, as well as other works by Lyon, can be viewed at Civil Rights Movement Veterans, *Movement Photographs of Danny Lyon*, http://www.crmvet.org/images/plyon.htm (accessed Jan. 30, 2008).

27. Owens, *supra* n. 1.

28. Westbrooks-Griffin, *supra* n. 11, at 28. The exact circumstances leading to the girls' release are unclear. Owens, *supra* n. 1. LuLu attributes her release to then-Attorney General Bobby Kennedy and perhaps even his brother, President John F. Kennedy, who she suspects received the pictures after they were published in several black newspapers and magazines, though such a theory has never been substantiated. *Id.*

29. Westbrooks-Griffin, *supra* n. 11, at 29. As a further indignity, the girls' families

their way to Senator Harrison A. Williams of New Jersey, who entered them into the Congressional Record not long after the girls' release.[30] Senator Williams called the conditions in which the girls had been held "disgraceful."[31]

In some ways, the girls' story is not entirely unique; racially motivated atrocities, human-rights violations, and general race-motivated injustices were a part of Jim Crow[32] Southern life for over one hundred years following Lincoln's Emancipation Proclamation.[33] On the other hand, their story is one that has been widely ignored by American history. The relative obscurity of their story coupled with the shocking inhumanities suffered upon girls so young makes this an especially heart-wrenching and poignant narrative for contemporary telling. It also poses a lingering and difficult question: to what extent should modern America attempt to rectify the evils of its past?

B. Scope of This Article

During the past fifteen years, the debate over whether some sort of reparations[34] should be afforded African Americans has

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were charged a two dollar per day "boarding fee" for the time spent incarcerated in the stockade. Owens, *supra* n. 1.

30. Owens, *supra* n. 1.

31. Senator Williams' entry seems to make the following direct references to the plight of the girls:

> All told, about 200 young people, many of them in their early teens, have been arrested in Americus, Georgia. Lacking adequate jail facilities, the authorities have placed many of the youngsters in an old abandoned newspaper building without furnishings, without bedding, without working toilet facilities, and without adequate ventilation. One shower tap provides the only drinking and bathing water. The stench throughout is unbearable. Mr. President, I wish the Record could show the jail facilities in use in Americus. But I have with me some pictures that were secretly taken and smuggled out. They really make you wonder whether they could have been taken in the United States of America at this point in the [twentieth] century. . . . Mr. President, I can only say that these conditions are disgraceful.

109 Cong. Rec. S18040–18041 (daily ed. Sept. 25, 1963).

32. The term "Jim Crow" refers to a series of laws the southern states adopted around 1900 that deprived African Americans of their civil rights. Ronald L.F. Davis, *Creating Jim Crow*, http://www.jimcrowhistory.org/history/creating.htm (accessed Jan. 30, 2008).

33. *See e.g.* Emma Coleman Jordan, *A History Lesson: Reparations for What?* 58 N.Y.U. Ann. Surv. Am. L. 557, 570–572 (2003) (examining the history of race-motivated lynching nationwide in post-Civil War America and noting that "[t]he largest number of lynchings occurred in the Deep South").

34. When one speaks of reparations, a variety of modes for restitution come to mind, making it a difficult term to define. However, one scholar recently provided a broad and

become increasingly vibrant in both legal and nonlegal circles.[35] During this period, there have been a handful of African-American-reparations lawsuits pressed before the courts,[36] and various legislative reparations have also been made.[37] Much of the momentum built during this period was stalled in 2004 when the United States Court of Appeals for the Tenth Circuit dismissed a claim brought by victims and descendants of the 1921 Tulsa Race Riots.[38] To a large extent, the Tulsa case was an experiment designed to test various legal strategies formulated to make the idea of reparations for specific Jim-Crow-era crimes a

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surprisingly simple definition: reparations are "programs that are justified on the basis of past harm and that are also designed to assess and correct that harm and/or improve the lives of victims in the future." Alfred L. Brophy, *Reparations: Pro & Con* 9 (Oxford U. Press 2006).

35. One scholar traces the first law review article written specifically on the topic of whether to pay such reparations to Vincene Verdun's 1993 work entitled *If the Shoe Fits, Wear It: An Analysis of Reparations to African Americans*, found in the *Tulane Law Review*, volume 67 at page 597. Brophy, *supra* n. 34, at 65. The same scholar lists two primary reasons for the sudden boom in reparations debate. First, despite the fact that, in recent memory, other victimized groups have received reparations in the form of payments and apologies—including groups afflicted by foreign governments, such as victims of the Nazi Holocaust, and those who suffered here in America, such as Native and Japanese Americans—African Americans have not received reparations for generations of enslavement or unequal treatment. *Id.* at 55. The second reason is "the rapidly decreasing commitment to affirmative action in the legislatures and the courts." *Id.*

36. *See e.g. In re African-American Slave Descendants Litig.*, 471 F.3d 754 (7th Cir. 2006); *Alexander v. Okla.*, 382 F.3d 1206 (10th Cir. 2004); *Cato v. U.S.*, 70 F.3d 1103 (9th Cir. 1995).

37. Examples of legislative reparations include monetary payments to victims and the survivors of victims, as was the case in 1994 when the Florida Legislature appropriated $2 million to compensate victims and descendants of the murders and mass structural burnings in the black community of Rosewood, Florida, all of which local authorities allowed to transpire, uninterrupted, for a week in early 1923. *See* Fla. Sess. L. Serv. ch. 94-359 (C.S.H.B. 591), 13th Leg., 2d Reg. Sess. (May 4, 1994) (available on Westlaw, FL-LEGIS-OLD file) (appropriating funds to the victims because "[t]he Rosewood Massacre was a unique tragedy in Florida's history in that the [s]tate and local government officials were on notice of the serious racial conflict . . . and had sufficient time and opportunity to act to prevent the tragedy, and nonetheless failed to act . . . ."); *see also* Maxine D. Jones, Larry E. Rivers, David R. Colburn, R. Tom Dye, and William W. Rogers, *A Documented History of the Incident which Occurred at Rosewood, Florida in January 1923 and Appendices* (Fla. Bd. Regents 1993) (embodying the full investigative findings of the Rosewood Massacre as submitted to the Florida Board of Regents on December 22, 1993). Legislative reparations also include official state apologies, as witnessed by the recent apology for slavery made by the Virginia Legislature, which unanimously approved the gesture. *See generally* Jenny Jarvie, *Formal Slavery Apologies Debated*, L.A. Times A7 (Mar. 19, 2007) (available on Westlaw at 2007 WLNR 5139514) (describing the formal apology and the prospect of other state legislatures, as well as Congress, following suit).

38. *Alexander*, 382 F.3d at 1211. The *Alexander* decision and its importance are discussed in more detail *infra* notes 145–154.

realistic concept.[39] Its dismissal seems to have "taken the wind out of" reparations debate and theory.[40]

This Article seeks to reinvigorate the topic, not only by providing additional historical fodder in the form of a relatively untold and compelling story of Jim Crow tragedy—that of the Leesburg Stockade Girls—but also by proposing a system in which legislatures would provide guidance to courts so that meaningful and realistic reparations may be had. Part II provides a brief history of the call for African American reparations and then broadly articulates the various arguments typically made on each side of the debate. Part III then seeks to differentiate between reparations claims that broadly seek restitution for the practice of slavery and those that seek it for specific Jim-Crow and Civil-Rights-era offenses, arguing that the latter type of claim is preferable for a number of reasons. Finally, building upon the idea that more specific African-American-reparations claims are superior to their broad, slavery-based counterpart, Part IV argues that, in the wake of the Tulsa Race Riot litigation's dismissal, legislative guidance is not only warranted, but necessary, should some type of reparation ever be afforded to those who were most egregiously harmed by Jim Crow. Part IV also gives various factors a proactive legislature should consider when determining who will receive reparative treatment. Specifically, Part IV proposes that legislatures should reinvigorate stale claims by extending statutes of limitations in instances where courts of the day were realistically closed to injured African American plaintiffs.

II. THE STRUGGLE FOR BLACK RESTITUTION: TO PAY OR NOT TO PAY?

A. Forty Acres and a Mule: A Brief History of the Call for African American Reparations

Even while slavery was still a legal institution in the United States, there were calls to go beyond emancipation "and to make a

39. *See generally* Anthony J. Sebok, *How a New and Potentially Successful Lawsuit Relating to a 1921 Race Riot in Tulsa May Change the Debate over Reparations for African-Americans*, http://writ.news.findlaw.com/sebok/20030310.html (Mar. 10, 2003) (discussing the lawsuit's significance and characterizing it as a "test case").

40. Brophy, *supra* n. 34, at 131.

national acknowledgement to [slaves] for the wrongs . . . inflicted on [them]."[41] However, the moment in American history that is most frequently pointed to as the first call for reparations occurred after emancipation. As the Civil War neared its end and a Union victory was imminent, General William T. Sherman promised that 400,000 acres of confiscated Confederate land along the Georgia–South Carolina coastline would be divided into forty-acre plots and distributed, along with Army-lent mules, to freed slaves.[42] Although this promise, issued in Sherman's Field Order 15,[43] was subsequently revoked by President Andrew Johnson and therefore never came to fruition,[44] it created the following rallying cry for future proponents of black reparations that survived the years: "Forty Acres and a Mule."[45]

Beginning in the late 1800s, a variety of African American associations formed to seek change for the betterment of ex-slaves and their descendants. The Ex-Slave Mutual Relief, Bounty, and Pension Association (the Association), for instance, boasted about 600,000 members and lobbied Congress, although unsuccessfully, for the passage of legislation designed to provide various forms of reparations.[46] Later, African nationalist movements picked up the pace, beginning with Marcus Garvey's United Negro Improvement Association and continuing through the 1960s and 1970s with organizations such as the Nation of Islam and the African People's Socialist Party.[47] These groups "kept the

41. Adjoa A. Aiyetoro, *Formulating Reparations Litigation through the Eyes of the Movement*, 58 N.Y.U. Ann. Surv. Am. L. 457, 458 n. 3 (2003) (quoting David Walker, *David Walker's Appeal* 90 (Black Classic Press 1993)).

42. *Id.* at 458–459; Brophy, *supra* n. 34, at 25.

43. The Order is republished in Brophy, *supra* note 34, at 183–185, appendix 1.

44. *Id.* at 25. While freed slaves were initially allowed to reside on the land, Union forces ultimately evicted those inhabitants and returned the land to Southern whites. *Id.*

45. Aiyetoro, *supra* n. 41, at 458.

46. *Id.* at 461–462. This lack of success is at least partially attributable to concerted governmental efforts aimed at debilitating the Association by attacking its leaders with unsubstantiated charges, such as mail fraud. *Id.* at 462. In this way, and for years to come, the United States government "avoid[ed] addressing the demand for reparations by attempting to disparage the reputations of the leaders of the demand." *Id.*

47. *Id.* at 462–463. Garvey's "Back to Africa" movement can be seen as an international call for reparations. *Id.* at 462. Indeed, Garvey's public speech often dripped with the language of reparations. *See e.g.* E. David Cronon, *Black Moses: The Story of Marcus Garvy and the Universal Negro Improvement Association* 65 (U. Wis. Press 1969). Cronon quotes Garvey as saying

demand alive by placing reparations in their programs of action."[48]

It is also worth noting that during the years after emancipation, various Congressional actions can be understood as forms of reparations. The Civil Rights Act of 1866[49] gave freed slaves the right to freedom of contract. Various types of "legislation made it a federal crime to interfere with their civil rights,"[50] including the Thirteenth Amendment's[51] prohibition on slavery, the Fourteenth Amendment's[52] promise of equal treatment under federal and state law, and the guarantee of the right to vote made by the Fifteenth Amendment,[53] which, of course, only applied to black men.

Nevertheless, like Sherman's promise of forty acres and a mule, most of the reparative measures guaranteed by these and other legislative actions were not entirely honored. Particularly in the American South, "a combination of violence and 'black codes'" created a system of living in which blacks were denied equal treatment.[54] This system of Jim Crow "created a regime of segregation, of limited voting rights, [and] of limited economic and educational opportunities for African Americans."[55] As such, for the better part of the twentieth century, organizations and associations that might have otherwise sought reparations, such as the National Association for the Advancement of Colored People (NAACP), the Congress of Racial Equality (CORE), and SNCC, turned their attention and efforts toward securing those promised rights of equality that remained unsecured.[56]

> We do not desire what has belonged to others, though others have always sought to deprive us of that which belonged to us. . . . If Europe is for the Europeans, then Africa shall be for the black peoples of the world. We say it; we mean it. . . . The other races have countries of their own and it is time for the [400 million] Negroes to claim Africa for themselves.

Id. Garvey himself would fall victim to federal mail fraud charges, and his conviction on those charges would ultimately precipitate his deportation from the United States. Aiyetoro, *supra* n. 41 at 462.

48. *Id.* at 463.

49. 42 U.S.C. § 1981 (2006).

50. Brophy, *supra* n. 34, at 27.

51. U.S. Const. amend. XIII.

52. *Id.* at amend. XIV.

53. *Id.* at amend. XV.

54. Brophy, *supra* n. 34, at 28.

55. *Id.*

56. *See id.* at 34 (stating that "[t]he times were such that reparations for past injustice were not the most pressing issue; merely stopping unequal treatment was more urgently

In recent years, as equal treatment under the law has slowly, little-by-little been realized, there have once again been demands for reparations. Beginning in the late 1960s, a number of authors made renewed claims for reparations, arguing that America, the most affluent nation in the world, had a moral responsibility for generations of slavery and Jim Crow.[57] More recently, organizations such as the National Coalition of Blacks for Reparations in America (N'COBRA)[58] and the Restitution Study Group (RSG)[59] have taken up the cause. These organizations have pursued reparations through the judiciary,[60] Congress,[61] public opinion,[62] and private entities.[63] At the same time, reparations have been awarded to other groups, including Native Americans,[64] Japanese

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needed"). It should be noted that there was, to a limited extent, government action taken in response to Jim Crow's system of violence and oppression. For instance, in the early 1900s, plagued by a series of mob-driven race riots which caused personal and property damage, the Illinois Legislature passed a statute which gave victims of lynching and mob violence a specific cause of action against the municipalities that failed to protect them. Alfred L. Brophy, *Reconstructing the Dreamland: The Tulsa Riot of 1921* 108 (Oxford U. Press 2002). Over the years, victims of such violence used the act to bring claims that resulted in awards totaling about $500,000. Brophy, *supra* n. 34, at 30 tbl. 2.1. These payments, which can be understood as a form of reparations, are "some of the few riots for which black victims have ever received compensation" despite the prevalence of similar race-motivated violence perpetrated across the country during Jim Crow's reign. *Id.* at 29.

57. *E.g.* Boris Bittker, *The Case for Black Reparations* (Vintage Press 1973) (reissued Beacon Press 2003); James Forman, *The Black Manifesto*, in *Black Manifesto: Religion, Racism, and Reparations*, 114–126 (Robert S. Lecky & H. Elliot Wright eds. 1969).

58. N'COBRA's official website can be found at http://www.ncobra.org/aboutus.htm.

59. RSG's website can be found at http://www.rsgincorp.com.

60. *See e.g. In re African-American Slave Descendants Litig.*, 471 F.3d 754 (demonstrating RSG's efforts to secure reparations for the descendants of slaves).

61. *E.g.* H.R. 40, 106th Cong. (Jan. 6, 1999). Known as the Reparations Study Bill, Congressman John Conyers, with the support of N'COBRA, Aiyetoro, *supra* n. 41, at 463, introduced legislation that would establish a commission to study the lingering effects of slavery and Jim Crow upon African Americans, and, depending upon those findings, would permit the committee to make recommendations as to what types of reparations should be employed. H.R. 40, 106th Cong. at §§ 2–3. Although the legislation has never been passed, "N'COBRA has been instrumental in obtaining support for H.R. 40 from a number of state and municipal legislative bodies." Aiyetoro, *supra* n. 41, at 464 n. 40.

62. *See Bridging the Color Line: The Power of African-American Reparations to Redirect America's Future*, 115 Harv. L. Rev. 1689, 1693 (2002) (stating that to become a reality "African-American reparations must succeed in the court of public opinion").

63. Having been pressed by reparations supporters, JPMorgan Chase and Wachovia, for instance, have both agreed to voluntarily investigate their role in the American slave trade, and have apologized for those connections. Brophy, *supra* n. 34, at 144–145. JPMorgan actually pledged $5 million to college scholarships for African Americans after learning its predecessors had at one time owned 13,000 slaves. *Id.*

64. *See e.g.* Alaska Native Claims Settlement Act of 1971, 43 U.S.C. § 1601 (2006) (returning about 44 million acres of land and providing Alaskan tribes with nearly $1

Americans,[65] and Hawaiian Natives.[66] These examples and others demonstrate that "many times in the past, state and federal governments have used their vast power to improve the lives of those injured by the government's acts, as well as others."[67] Yet meaningful black reparations for slavery and Jim Crow remain largely unrealized,[68] which, in recent times, has caused an explosion of demands for restitution and a variety of retorts against these arguments.

B. The Modern Debate: Is There a Duty to Pay?

The reemergence of African-American-reparations talk has, to a large extent, illustrated how far apart America remains on issues of race.[69] Indeed, the prospect of providing some sort of reparation for the institution of slavery appears to garner less support from modern white America than integration did during the tumultuous Civil Rights era.[70] This is true even when the reparation to be issued is a mere apology and therefore has no financial implications.[71] A 2003 study conducted by researchers at Harvard University and the University of Chicago found that only 30% of white Americans favored a government-issued apology for slavery, while 79% of black respondents wanted an apology.[72]

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billion in compensation).

65. *See generally* Peter Irons, *Justice Delayed: The Record of the Japanese Internment Cases* (Wesleyan U. Press 1989) (discussing the long battle and eventual victory in the fight for Japanese American reparations); *see also* Civil Liberties Act of 1988, 50 U.S.C. § 1989(b)(1–9) (2006) (appropriating $1.65 billion to compensate Japanese Americans wrongfully interned during World War II).

66. *See* Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 Mich. L. Rev. 821, 895–900 (1997) (describing the long path toward Native Hawaiian reparations, beginning in 1921 with a Congressionally established trust designed to return wrongfully taken Hawaiian lands to their rightful owners, and culminating in 1995 with the Hawaiian Legislature's establishment of a $600 million trust dedicated to rectifying decades of the trust's mismanagement).

67. Brophy, *supra* n. 34, at 41.

68. There have been isolated instances of meaningful reparations made to victims of Jim Crow. The best example remains the Florida Legislature's decision to compensate victims and descendants of the 1923 Rosewood Massacre. *See supra* n. 37 (describing the Rosewood incident and the payment to victims decades later).

69. Brophy, *supra* n. 34, at 3–6.

70. *Id.* at 4.

71. *Id.* at 5.

72. *See* Harbour Fraser Hodder, *The Price of Slavery*, Harvard Magazine (May–June 2003) (available at http://www.harvard-magazine.com/on-line/050319.html) (accessed Mar. 22, 2006) (reporting the study's findings).

Even more striking is that while 67% of blacks agreed with the idea of providing compensation for slavery, a paltry 4% of whites approved the concept.[73] To better understand this stark divisiveness, it may be helpful to briefly consider the arguments made on each side of the reparations debate.

1. Arguments against African American Reparations

In 2001, as reparations talk swirled, former civil rights activist David Horowitz took out advertisements in college newspapers across the country, listing ten reasons why reparations should not be afforded to African Americans.[74] The list has been described as the "*locus classicus* for anti-reparations arguments, condensing all the objections into an easily digestible list."[75] An idea repeatedly reflected in several of these reasons, which has become perhaps the most popular argument used by opponents of black reparations, is that "the people currently asked to pay had nothing to do with the injustices of the past."[76] Indeed, Horowitz noted that modern America is multi-ethnic and that a large portion of the current population and its ancestors did not arrive until after slavery was banished.[77] Furthermore, Horowitz argued that, to some extent, all groups benefited from and perpetrated slavery.[78]

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73. *Id.* Interestingly, 49% of white respondents supported an apology for World War II Japanese American internment, and 26% went so far as to say they supported paying monetary compensation for that wrong. *Id.*

74. David Horowitz, *Ten Reasons Why Reparations for Blacks Is a Bad Idea for Blacks—and Racist Too*, http://www.frontpagemag.com/Articles/ReadArticle.asp?ID=1153 (Jan. 3, 2001). For somewhat of a retort to Horowitz piece, in the form ten reasons in favor of African American reparations, *see* Earl Ofari Hutchison, *Ten Reasons for Reparations*, http://www.alternet.org/story/10680 (Apr. 3, 2001).

75. Charles J. Ogletree, Jr., *Repairing the Past: New Efforts in the Reparations Debate in America*, 38 Harv. Civ. Rights-Civ. Libs. L. Rev. 279, 308 (2003).

76. Alfred L. Brophy, *The Cultural War over Reparations for Slavery*, 53 DePaul L. Rev. 1181, 1202 (2004).

77. Horowitz, *supra* n. 74, at Reason Four. "What rationale would require Vietnamese boat people, Russian refuseniks, Iranian refugees, and Armenian victims of the Turkish persecution, Jews, Mexicans, Greeks, or Polish, Hungarian, Cambodian and Korean victims of Communism, to pay reparations to American blacks?" *Id.*

78. *Id.* at Reasons One and Two. "There were 3,000 black slave-owners in the antebellum United States . . . [and] American blacks on average enjoy per capita incomes in the range of twenty to fifty times that of blacks living in any of the African nations from which they were kidnapped." *Id.* In this way, he attempts to distinguish the call for slavery reparations from recent instances in which the survivors and descendants of Japanese American internment, the Jewish Holocaust, and the Rosewood Massacre were paid, in that, in these instances, the direct victims or their immediate families were compensated. *Id.* at

At the same time, not only did a proportionally small number of whites actually own slaves, many gave their lives to end the institution itself.[79]

Other arguments are quintessential anti-affirmative-action stances. For instance, Horowitz claimed the call for reparations triggers a "renewed sense of grievance" that "burden[s] [African Americans] with a crippling sense of victim-hood."[80] He characterized reparations claims as "separatist idea[s] that set[ ] African-Americans against the nation that gave them freedom."[81] Finally, he argued that, at any rate, reparations have already been paid to African Americans in the form of welfare payments and affirmative action-style racial preference, resulting in increased black contracts, better job placement, and a higher rate of education admissions.[82]

Others have criticized the notion of African-American-slave reparations on the basis of the potentially enormous economic burden it may impose upon modern America.[83] Further, some argue that allowing slave reparations could "open up a 'Pandora's Box' of other groups seeking reparations for the injustices suf-

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Reason Five. Reparations for slavery would pay the ancestors of blacks who arrived after the end of slavery in America as well as those who actually owned slaves. *Id.*

79. *Id.* at Reason Three. Three hundred fifty thousand Union soldiers died in the Civil War, and of those "who lived in the ante-bellum South . . . only one white in five was a slaveholder." *Id.*

80. *Id.* at Reason Seven.

81. *Id.* at Reason Ten. As opposed to taking a divisive stance by demanding reparations for what afflicted their ancestors over one hundred years ago, Horowitz argued blacks owe a debt to America. *Id.* at Reason Nine. Horowitz noted that "there was never an anti-slavery movement until white Christians—Englishmen and Americans—created one." *Id.* Of course, this argument ignores the fact that there would have been no need for Englishmen and Americans to begin an anti-slavery movement had they not created the institution of slavery in the first place.

82. *Id.* at Reason Eight; *but see* Robert Chrisman & Ernest Allen, Jr., *Ten Reasons: A Response to David Horowitz* Reason Eight, http://www.umass.edu/afroam/hor.html (accessed Mar. 23, 2007). Chrisman and Allen make the following argument in response to Horowitz's welfare argument:

> Welfare benefits and racial preferences are not reparations. The welfare system was set in place in the 1930s to alleviate the poverty of the Great Depression, and more whites than blacks received welfare. So-called "racial preferences" come not from benevolence but from lawsuits by blacks against white businesses, government agencies, and municipalities, which practice racial discrimination.

Id. (internal quotations omitted).

83. Peter Flaherty & John Carlisle, *The Case against Slave Reparations* 1 (Natl. Leg. Policy Ctr. 2004) (available at http://www.nlpc.org/pdfs/Final_NLPC_Reparations.pdf). These scholars list cost estimations ranging from $15 to $97 trillion. *Id.*

fered by their ancestors."[84] These opponents point to Chinese Americans, "Hispanic Americans, Italian Americans, Polish Americans, German Americans, Russian Americans, Portugese Americans, Scottish Americans, Armenian Americans, Greek Americans, Filipino Americans, and many more,"[85] including non-ethnic groups as well, such as oppressed laborers who could be represented by modern-day labor unions.[86]

Typically, then, those who argue against African American reparations focus their arguments upon restitution claims based on the crime of chattel slavery, and, to a lesser extent, the institution of Jim Crow in a broad sense. They conclude that such reparations would be unrealistically expensive, would burden entirely innocent taxpayers who had nothing to do with slavery while benefiting even those whose ancestors were not slaves or second-class Jim Crow citizens, and would cause more societal division than cohesion.[87]

2. Arguments in Favor of African American Reparations

Not surprisingly, proponents of African American reparations often place great emphasis on the government's moral responsibility to rectify past wrongs for which it is fully or partially responsible.[88] In addition, these scholars note that reparations are not

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84. *Id.* at 18.

85. *Id.* at 19.

86. *Id.* at 19–20.

87. *Id.* at 23, 38–39.

88. *See e.g.* David Lyons, *Corrective Justice, Equal Opportunity, and the Legacy of Slavery and Jim Crow*, 84 B. U. L. Rev. 1375, 1396–1397 (2004). This scholar stated the following about reparations:

> Since 1865, the government has violated or failed to enforce its own Constitution and legislative enactments for extended periods. In accepting violations of its own basic law, the federal government allowed the racial caste system to be reconfigured so that it could survive the abolition of slavery. . . . It tolerated gross misconduct by officials, frequent public lynchings, rape, harassment, terror, and coercion—in other words, widespread, grievous violations of African Americans' most fundamental rights. . . . It is the single most important currently existing party that can truly be held accountable to those who have suffered the wrongs of racial subjugation.

Id.; *see also* Katrina Wyman, *The Moral Justifiability of Redressing Historical Injustices*, J. Tort L. at *19, http://www.bepress.com/jtl/ (forthcoming date unknown) (copy on file with *Stetson Law Review*) (noting that the argument "most frequently made for redress is a backward-looking one rooted in a concept of moral rights . . . ." whereby "there is an obligation to correct injustices, and a corresponding right to have them redressed, even if they happened long ago").

just meant to rectify wrongs that occurred at some fixed point in the past, but are also geared toward soothing ongoing injuries that are directly connected to those past injustices.[89] For instance, while acknowledging that, globally, African Americans may generally live more comfortably than those Africans who today continue to live on their native continent,[90] in the United States great disparity still exists between African Americans and whites.[91] For instance, in 2004, while 24.7% of African Americans—nearly one in four—lived in poverty, only 8.6% of non-Hispanic whites fell below the federal poverty line.[92] Meanwhile, the median family income for African Americans was nearly $19,000 less than that for white families.[93] In arguing that reparations are morally necessitated, proponents draw a direct connection between these modern figures and government actions that preceded them, including decades of brutal slavery, followed by another one hundred years of Jim Crow oppression. In this way, the call for reparations can be seen as a call for social rectification.

Contrary to Horowitz's argument that the call for reparations is a divisive one,[94] proponents also focus heavily upon reparations' ability to provide healing to both victims[95] and soci-

89. *See generally* Brophy, *supra* n. 76, at 1204–1205 (quoting reparations activist Adjoa Aiyetoro as stating, "We're not raising claims that you should pay us because you did something to us 150 years ago. We are saying that we are injured today by the vestiges of slavery, which took away income and property that was rightfully ours.").

90. Horowitz, *supra* n. 74, at Reason Two. It should not be forgotten, however, that few would argue against the premise that the abuses of Western colonization continue to haunt the African continent and are a leading cause of many of the region's modern problems.

91. *See* Brophy, *supra* n. 34, at 56 (giving general information that highlights these disparities).

92. U.S. Census Bureau, *Current Population Reports, Income, Poverty, and Health Insurance Coverage in the United States: 2004*, 10 (2005) (available at http://www.census.gov/prod/2005pubs/p60-229.pdf).

93. *Id.* at 33–34.

94. *See supra* nn. 78–79 and accompanying text (arguing that supporters of black reparations are inherently separatist and divisive); *but see* Aiyetoro, *supra* n. 41, at 473 (noting that the argument against reparations for fear of divisiveness is the same warning that has been issued "for every effort that has been launched to end the continuing badges and indicia of slavery" and reminding that "wait" has been a continuous warning issued to abolitionists, anti-segregationists, and now those seeking reparations).

95. *See generally* Brent T. White, *Say You're Sorry: Court-Ordered Apologies as a Civil Rights Remedy*, 91 Cornell L. Rev. 1261 (2006) (making a compelling argument for the use of court-ordered apologies as a means for soothing the indignity suffered by victims of civil rights abuses). White first notes the prevalence of contemporary, electronic media-aided

ety.[96] They emphasize the symbolic gesture attached to paying reparations for past injustice, which demonstrates that government accepts responsibility for its role in the harm.[97] Acceptance, then, becomes "an important part of healing, since there is no longer a denial of the crime."[98]

Similarly, reparations can be understood as a means of presenting a historical narrative, or perhaps more accurately stated, of "demand[ing] that all of American history be fully acknowledged, accounted for, and valued."[99] This seems to be an important point, particularly with regard to Jim Crow reparations because many victims may still be alive and prepared to share their stories. Often, victims merely want their stories fully told so that their suffering may be publicly acknowledged.[100] Undoubtedly,

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public apologies and their "central role in resolving disputes in modern American culture." *Id.* at 1266–1268. He also points to their importance in modern legal norms, particularly with regard to criminal proceedings, noting that "under the Federal Sentencing Guidelines, defendants who refuse to apologize routinely serve sentences that are up to 35% longer than those who do." *Id.* at 1269. Importantly, he provides examples and statistics outside the realm of civil rights that suggest that injured plaintiffs involved in various types of litigation greatly value apologies from defendants. *Id.* at 1271–1273 (explaining that "up to 98% of medical civil malpractice claimants desire apologies" and providing specific examples of apology-driven litigation, including the instance of an Indian American plaintiff who was forcibly removed from an airplane and filed suit in order "to make them acknowledge that what they did was wrong."). Still, in terms of court-ordered apologies as a form of reparations for past injustices, White acknowledges that apology without more concrete "restitution can be a 'hollow form.' If you wreck someone's car, even the most profuse apology, without an offer to repair the damage, is meaningless." *Id.* at 1310.

96. *See e.g.* Martha Minow, *Between Vengeance and Forgiveness* 61 (Beacon Press 1998) (hypothesizing "that testimony of victims and perpetrators, offered publicly to a truth commission, affords opportunities for individuals and the nation as a whole to heal); Brophy, *supra* n. 56, at 112 (listing the potential for "build[ing] trust in the community" as a possible benefit of seeking reparations).

97. *See* Brophy, *supra* n. 56, at 112 (discussing the now-defeated possibility that Tulsa and Oklahoma would pay some sort of reparation for its role in the 1921 Race Riots).

98. *Id.*

99. Ogletree, *supra* n. 75, at 318. "Instead of forgetting the past and 'moving on,' it is vital that we remember the past." *Id.* In recent years, various legislative bodies have supported this notion as well. California has gone the farthest, requiring insurance companies to register on a website and disclose any ties it may have had to the slave trade, including insurance policies written on slaves. Cal. Ins. Code §§ 13810–13813 (2006); *see also* Brophy, *supra* n. 34, at 51 (discussing the law). In this way, modern American consumers can get a better grasp on history when making financial decisions. The registry is online at http://www.insurance.ca.gov/0100-consumers/0300-public-programs/0200-slavery-era-insur/ (accessed Dec. 17, 2007).

100. *See* Minow, *supra* n. 96, at 67 (arguing that "[t]estifying publicly before an official body can transform the seemingly private experience into a public one"). The author largely points to the instance of the South African Truth and Reconciliation Commission's

many of the Leesburg Stockade Girls feel this way, including Carol Barner-Seay, who said the following on the topic:

> Me, myself, personally will not let it die again. Whatever it takes, I will do it. Whatever the cost is, I'm willing to walk that line again. So I will not let this story die again. I will not let this story be buried again. I will fight to the end to still get justice that we long for.[101]

In this same vein, it has been argued that by creating a more accurate and fair historical narrative, future generations and potential perpetrators of crimes already carried out in the past will be less likely to repeat those mistakes.[102] Indeed, one scholar points to the aftermath of the Tulsa Race Riots as evidence of the importance of this reparations justification when governmental promises to help rebuild the burnt and demolished black section of Tulsa were soon forgotten following an all-white grand jury's determination that the black residents themselves were to blame for the rioting.[103]

Thus, proponents of African American reparations draw a distinct line connecting America's historical injustices committed against blacks, which government either sanctioned or permitted to occur, with today's inequalities. They do, therefore, see reparations as a sort of redistributive force with equitable intentions and see government as the most appropriate modern party for issuing reparations, given its culpability. They are keenly aware of the failings of traditional methods of historical recordation and see reparations as a unique vehicle for telling the whole tale. They believe the process will ultimately act as a cohesive national and community force, in that it will allow both society and victims to heal. At the same time, they believe societies can only avoid recommitting their tragedies by properly understanding and remembering those that have already transpired, and reparations

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public hearings on the effects of apartheid, quoting one mother as stating that she had testified because she "wanted the world to see [her] tears." *Id.*

101. Interview with Carol Barner-Seay, *supra* n. 5.

102. *See e.g.* Brophy, *supra* n. 76, at 112 (stating that reparations "make similar events—in which the community collectively fails to enforce the law—less likely to happen again").

103. *Id.* at 113.

legislation and litigation offer unique opportunities to force such remembrance.

III. DRAWING A LINE: SLAVERY REPARATIONS v. JIM-CROW-ERA REPARATIONS

Having briefly acknowledged the arguments on each side of the African-American-reparations debate, this Section distinguishes between claims of restitution for specific Jim-Crow-era crimes and those that broadly pursue restitution for the institutions of slavery or Jim Crow in general. In doing so, it attempts to demonstrate the superiority of the former type of reparations, given its ability to identify particular, individual victims who were harmed in isolated events by traceable assailants. Distinctions are primarily made in two ways. First, a distinction is made by displaying that the arguments against black reparations lose force when the call for reparations is based on specific incidents that occurred post-slavery during Jim Crow's reign over the social structure of the South.[104] Second, practical legal considerations are acknowledged in order to show that when litigation is the selected medium for pursuit of restitution, many of the pitfalls associated with seeking reparations for slavery do not hamper the quest for reparations for Jim Crow crimes.

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104. Again, these arguments are summarized *supra* at Part II(B)(1). For purposes of this Section, the premise that these arguments carry some degree of moral validity is assumed. The Author wishes to demonstrate, above all, that even those who vehemently oppose the cry for black reparations will have a much more difficult time making moral claims against such payments when the basis for restitution rests upon specific Jim-Crow-era crimes.

A. Morality as a Means of Differentiating[105]

1. "Innocent Parties Ought Not Have to Pay" and the Undeserving Beneficiary Arguments

Those opposed to awarding black reparations for yesteryear's horrors typically point to what they perceive to be inherent unfairness in asking modern generations to pay for the sins of their distant ancestors, particularly when (1) the ancestors of many who would be asked to pay arrived in the United States after the occurrence of the crimes for which compensation is sought[106] and (2) most who would receive the benefit were not directly affected by the crime, and, in some instances, may even have been complicit in the offense. In this sense, opponents argue it would actually be *immoral* to force modern citizens to pay for past offenses. They often focus their arguments upon reparations for slavery, noting that over 140 years have passed since the institution was abolished, and that, to put it bluntly, it is time to move on.[107]

However, when specific Jim-Crow and Civil-Rights-era travesties—such as the 1921 Tulsa Race Riots and the 1963 imprisonment of the Leesburg Stockade Girls—are the focus of repara-

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105. *But see* Ogletree, *supra* n. 75, at 281 (categorizing distinctions made between Jim Crow reparations and slavery reparations as "overstated"). Ogletree draws strongly upon notions of morality and the goal of "end[ing] a tradition of denying the consequences of slavery and Jim Crow era segregation" in claiming that "[t]here are very few meaningful distinctions between the claims presented on behalf of large classes of African Americans and small groups of identifiable victims of Jim Crow discrimination." *Id.* at 319. This Author does not wish to in any way downplay the strong moral arguments that can be made on behalf of the quest for slavery reparations. Rather, it is essentially argued that, from a tactical standpoint, Jim-Crow-reparations claims are stronger than their slavery counterpart because opponents have a more difficult time attacking them with their own set of moral arguments and because the latter form of restitution suffers from fewer "non-moral" dilemmas. It is also worth noting that the Author does not argue in favor of reparations for the institution of Jim Crow itself, though, again, there are strong moral arguments that can be made in support of such a position. Instead, it is argued that the bevy of specific crimes, torts, property, and contract violations, etc. that many African Americans suffered during the Jim Crow era should, individually, form the basis for modern black reparations.

106. Of course, it should not be forgotten that those who immigrate to the United States always must take the good with the bad. This is because "government bodies, like corporations, have a continuing existence." Brophy, *supra* n. 76, at 1204. Immigrants must accept the liabilities and debts lobbied against their new nation even though those liabilities may have been incurred prior to their arrival so that they may also seek the benefits and opportunities associated with their new nation. *Id.*

107. For a summary of this type of argument, refer to *supra* notes 74–76 and the accompanying text.

tions cries, these moral justifications for denying restitution lose strength. This is primarily because the correlation between beneficiary and past misdeed becomes increasingly strong when examining specific Jim-Crow-era claims, as opposed to broad slavery-based calls for reparations. Consider, for example, a claim by the women held in the Leesburg Stockade. First and foremost, the beneficiaries of successful reparations in such an instance would not be the entirety of an ethnic or racial group but direct victims of the crime itself: those girls who were held in the stockade. Even with regard to the Tulsa Race Riots, which occurred some forty years prior to the incarceration of the Leesburg Stockade Girls, some victims are likely still alive today, and, at any rate, even deceased victims have identifiable living descendants who inherited the harm bestowed upon their relatives.[108] Thus, reparations would flow directly to the individuals harmed by the past misdeed, and arguments that those who were not harmed or who may have been complicit in the crime are treated as beneficiaries are dispelled entirely.

Of course, the other argument is that it is unfair to force today's generation to pay for harms caused long ago.[109] This argument does not presuppose or assert that those asking for reparations are undeserving. It acknowledges that harm has been inflicted upon the claimant but nonetheless refuses to permit reparations because those who are being asked to pay are innocent. In this way, the argument inherently suggests that the rights of the many innocent outweigh those of the injured claimant or claimants.

There are a few things to say here. First, in terms of Jim Crow crimes, the harm did not occur so long ago. Indeed, in many instances, the crimes occurred only fifty or sixty years ago; in other words, the crimes occurred within the lifetime of many living citizens who are now being asked to pay. Second, it is important to determine who will be listed as guilty. For instance, if litigation were the medium selected to pursue reparations, it would be important to identify who would be listed as defendants so that their degree of innocence could be gauged. With regard to the

108. *See Alexander*, 382 F.3d at 1211 (noting that in 2004 all the plaintiffs filing suit were either "[r]iot survivors or descendants of survivors").

109. Flaherty & Carlisle, *supra* n. 83, at 20.

Leesburg Stockade Girls, for instance, their claim would likely target local governing bodies, such as the Americus Police Department and the City of Americus, as well as any living individuals who were directly involved in their mistreatment, and perhaps the State of Georgia itself.[110] In this sense, those who are expected to pay are either directly culpable or are greatly concentrated in terms of geographic locale, meaning that the number of "innocent" parties to pay (i.e., today's Americus taxpayers, for instance) remains minimal. Conversely, with regard to slavery reparations, the entire nation would likely be expected to pay.[111] In this sense, from a purely equitable standpoint, it can be argued that the right of the directly harmed victim or victims to be made whole trumps the right of innocent taxpayers, who are now fewer in number, given their geographic concentration.

Thus, we see that because Jim-Crow-era demands for reparations are temporally nearer and more geographically specific than broad slavery-based claims, moral arguments for denying reparations on the basis that they would penalize those not responsible and would benefit many who did not suffer lose most of their validity. It seems to follow from a moral standpoint, therefore, that the interests of the harmed claimant outweigh those of the parties asked to pay.

2. Reparations Have Already Been Paid, so Any Moral Responsibilities Have Been Satisfied

The argument that reparations have already been paid in the form of welfare and affirmative-action programs also fails to be compelling in terms of its applicability to specific Jim-Crow and Civil-Rights-era harms inflicted upon identifiable black individu-

110. In *Alexander*, the Tulsa Race Riot case, suit was filed against the City of Tulsa, the Tulsa Police Chief, the City of Tulsa Police Department, and the State of Oklahoma. 382 F.3d at 1211.

111. It is worth noting that the argument made against reparations on the basis of it being "immoral" to hold innocent parties accountable for the misdeeds of others is not particularly compelling because "[t]here are many crimes committed by government officials that lead the entire community to be liable for the actions of those officials." Brophy, *supra* n. 76, at 1202. For instance, one scholar points to liability extended to Los Angeles taxpayers when a damages verdict in favor of Rodney King was issued following his beating by city police. *Id.* He also points to instances in which shareholders have been held accountable for the misdeeds of the employees who work for the company whose stock they hold. *Id.* at 1202–1203.

als and communities by identifiable assailants.[112] This argument is based upon the premise that these types of programs were designed to in some way correct the harm caused by slavery and Jim Crow as institutions.[113] But when reparations are sought for specific crimes or violations, an important distinction should be made between such claims and general claims brought on the basis of harms caused by societal discrimination.[114] A claimant who seeks restitution on the basis of specific past offenses uniquely suffered by him or her seeks to be made whole in the way that a plaintiff filing a claim for battery or conversion wishes to be made whole. It can hardly be argued that affirmative-action preference and welfare will make such a claimant whole again.

3. Reparations Are Divisive and Cause a Culture of "Victimhood"

It is also argued that the push for black reparations instills a sense of "victimhood" in African Americans, has a tendency to pit the races against one another, and is therefore divisive and immoral.[115] As with the argument that presumes affirmative action and welfare are previously paid forms of restitution,[116] these arguments, which can be classified as typical anti-affirmative-action arguments, are not applicable to reparations sought by specific Jim-Crow-era claimants who wish to recover for harms bestowed upon them in specific incidents. Even if there is validity in the idea that rehashing events from 150 years ago causes unwar-

112. This argument is referenced *supra* note 82 and the accompanying text.

113. Again, it is highly questionable whether such programs should be considered black restitution measures. *See* Chrisman & Allen, *supra* n. 82 (arguing welfare and affirmative action are not reparations); *see also* Robert Westley, *Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?* 19 B.C. Third World L. Rev. 429, 436 (1998) (categorizing affirmative action as a commitment to a belief in the value of diversity, often above meritocracy, while support for reparations is based more upon the theory that blacks are owed compensation for something long since taken from them).

114. *See* Brophy, *supra* n. 34, at 131 (distinguishing between claims brought for "heinous and discrete crimes" and those based upon "general societal discrimination" in the context of whether or not to toll statutes of limitations).

115. For these arguments, refer to the positions taken by David Horowitz, described *supra* notes 80–81. Horowitz goes so far as to argue that the call for modern reparations for slavery is nothing more than an assertion that America owes today's black population something merely for being black, a prospect he claims is racist in and of itself. Horowitz, *supra* n. 74 at Reason Five.

116. Horowitz, *supra* n. 74, at Reason Eight.

ranted divisiveness today, it can hardly be argued that potential reparations claimants such as the Leesburg Stockade Girls, who continue to suffer from the emotional scarring associated with events that transpired in their lifetime,[117] will cause any further divisiveness or promote a culture of victimhood. Indeed, specific Jim-Crow-era claimants are victims not because they belong to a group that was formerly brutalized by past American culture and society but because they themselves (or their direct descendants) were brutalized, beaten, stolen from, raped, intimidated, murdered, or otherwise mistreated by identifiable assailants. The issue, when speaking of specific Jim-Crow-era reparations, is not one involving the potential to cause modern societal divisiveness, but one involving the potential to allow those individuals already victimized by past injustice an opportunity to heal, recover their losses, and readapt themselves back into society.

B. Legal Means of Differentiating

This Section will demonstrate how many of the legal failings associated with slavery-based reparations are not pertinent when restitution is sought from a court for specific Jim-Crow-era crimes. Expressly discussed are problems with specifying harm caused to one party (plaintiff) by the act of another (defendant), calculating damages, and skirting otherwise expired statutes of limitations.

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117. For instance, one of the girls held in the stockade admits it took her years to return to a normal way of living as follows:

> For years after [the imprisonment] I had bad dreams. I would wake in the night sweating, screaming. Mom heard me crying and comforted me, but the nightmares persisted. I hated when the lights went out; that I feared a lot. The horrible dreams persisted throughout my late twenties.

Westbrooks-Griffin, *supra* n. 11, at 12. The same types of distress have been recognized in many others who experience traumatic events, including "Holocaust victims, . . . battered women, child abuse victims, and incest survivors." Minow, *supra* n. 96, at 64. It has been said that the injury suffered by traumatized victims "follows two stages: relinquishing autonomy, connections with others, and moral principles in the face of terror and domination; and then, losing the will to live." *Id.* Minow "stresses the importance of learning to recover memories and to speak of atrocities in order to heal." *Id.* at 65. Again, the process of obtaining reparations often provides a forum in which victims can speak and heal.

1. Identifying the Parties and the Harm Caused

Lawsuits that have sought reparations for slavery have typically been hampered by their inability to specifically identify one party, as plaintiff, who was harmed by a particular act of another readily identifiable party, who can serve as defendant.[118] Succinctly put, "[t]o succeed on a lawsuit for reparations, plaintiffs have to show that they (or someone for whom they hold the right to sue) were injured, that the injury was caused by some person who had a duty to not injure that person, and that said injury resulted in damage."[119] This ability to show that another's actions have caused an identifiable injury is a requisite component of plaintiff standing, which permits a court to hear a party's claim.[120]

Some slavery-reparations lawsuits have been able to identify a specific defendant. For instance, a recent trend has been to seek restitution from companies that in some way supported the slave trade, often by transporting slaves to America, financing the process, writing insurance policies on slaves, or, in some instances, by actually owning slaves.[121] But even these claims suffer from an inability to trace an identifiable injury to the plaintiffs, who are typically individuals claiming to be the ancestors of slaves.[122]

Jim-Crow-era reparations claims typically avoid these problems entirely. For instance, in the Tulsa Race Riots litigation, all plaintiffs were either survivors or the direct descendants of the survivors of the 1921 riot that resulted in the burning of forty-two city blocks in Greenwood, the black district of Tulsa, as well as widespread murder and looting.[123] The lawsuit was filed against

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118. *See e.g. Cato*, 70 F.3d at 1109 (determining the plaintiff's claim against the government for harm caused to her ancestors by the practice of slavery "proceed[ed] on a generalized, class-based grievance . . ." and that "[w]ithout a concrete, personal injury . . . that [was] fairly traceable to the government conduct . . . challenge[d] as unconstitutional," the plaintiff lacked standing).

119. Brophy, *supra* n. 34, at 98.

120. *Id.* at 99.

121. *See e.g. In re African-American Slave Descendants Litig.*, 471 F.3d at 757 (articulating the alleged activities of listed defendants).

122. *Id.* at 759 (holding that the "causal chain is too long and has too many weak links for a court to be able to find that the defendants' conduct harmed the plaintiffs at all . . . ").

123. *Alexander*, 382 F.3d at 1211–1212. A complete account of this horrific tragedy is provided in Alfred Brophy's *Reconstructing the Dreamland: The Tulsa Riot of 1921*. Bro-

local and state authorities that not only allowed and encouraged the rioting to occur, but, in many instances, participated in the offenses and then subsequently covered up their complicity.[124] The harm caused was apparent and readily identifiable: not only had victims incurred death and injury, there was massive property loss[125] followed by a concerted city effort to seize the then rubble-laden land through the passage of zoning ordinances that made it too expensive for black families to rebuild.[126] Thus, as the Tulsa litigation demonstrates, Jim-Crow-era-reparations suits would involve readily identifiable plaintiffs who were harmed by specific acts committed by particular defendants.

2. Calculating Damages

Assuming a plaintiff asserting a slavery-reparations claim could successfully assert standing, how would a court then determine the amount of damages that should be awarded the ancestors of slaves for the government's—or even a corporation's—role in the institution?[127] How much would ancestors of slaves have gained in inheritance had the institution never existed?[128] Even if slaves would have amassed great wealth from their labors had they not been held in captivity, how much of this wealth would have "trickled down" to their ancestors?[129] Simply put, the harm caused by slavery, even if apparent, fails to yield a precise formula that could be used to calculate damages that should be awarded to modern ancestors of those slaves. This is not, in and of itself, a fatal failing of the pursuit for slavery reparations because

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phy, *supra* n. 56.

124. *Alexander*, 382 F.3d at 1211–1212.

125. An estimated $5 million worth of property damage was incurred. Brophy, *supra* n. 56, at 93.

126. *Id.* Afterwards, the local black newspaper perceptively noted that "[t]he worst crime of the Tulsa riot . . . was 'not the burning of homes, nor the wholesale massacre of black men and women.' The worst crime was the city's ordinance, 'where white men sat down and deliberately conspired to confiscate the very land and ashes where black men had dwelt.'" *Id.* at 94

127. Troublingly, the institution of slavery was legal when Africans were plucked from their native lands and shipped as human cargo to America, where for generations their labor would be brutally extracted without compensation. Many courts would likely, then, see this type of reparations claim as a request to "impose liability where there had been none before." Brophy, *supra* n. 34, at 104.

128. *In re African-American Slave Descendants Litig.*, 471 F.3d at 759–760.

129. *Id.*

the Supreme Court has routinely allowed lawsuits even where it is exceedingly difficult to calculate damages.[130]

Nevertheless, it is yet another example of why Jim-Crow-era-reparations suits are preferable to their slavery-based counterpart. Often, computation formulas can be used to calculate the damage caused by specific Jim-Crow-era crimes in the same way that damages are calculated in lawsuits for recent torts since specific instances of loss are being referred to.[131] To use Tulsa as an example once again, initial estimates of the day placed property damage at $1.5–2 million, and additional evidence suggests the rioting may have been even more destructive.[132] On the other hand, slavery-based claims are unable to even begin to calculate realistic damages.

3. Statutes of Limitations

The one legal hurdle that seems to stymie both types of reparations lawsuits is the statute of limitations, a legislatively created restriction that limits the amount of time after the occurrence of an injurious event in which a lawsuit may be properly heard by a court. Typically, these statutes of limitations range in time from one to six years, and most tort claims—which are the kind often proposed when speaking of black reparations—are restricted by a two-year limitation.[133] Thus, it matters not whether the pertinent events occurred forty years ago or one hundred forty years ago: a modern claim would still be barred by the statute of limitations.

There are various ways around a statute of limitations defense, including accrual-based theories, equitable estoppel, and equitable tolling.[134] Accrual takes place at the judicially determined moment when the statutorily proscribed period to bring a

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130. *See e.g. Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562–564 (1931) (holding that so long as a plaintiff can show he was injured by a defendant, he should be allowed to recover, even if "he can not show the exact amount [of damage] with certainty").

131. Brophy, *supra* n. 34, at 106.

132. Brophy, *supra* n. 56, at 93.

133. Ogletree, *supra* n. 75, at 299 n. 115.

134. *See* Suzette M. Malveaux, *Statutes of Limitations: A Policy Analysis in the Context of Reparations Litigation*, 74 Geo. Wash. L. Rev. 68, 86–92 (2005) (describing recognized exceptions to statutes of limitations).

claim begins.[135] When a claim accrues, the injured party will have a certain amount of time, defined by statute, to bring the claim before it is forever barred.[136] The discovery rule dictates that accrual should begin when the plaintiff discovers or should have discovered the injury.[137] However, in certain circumstances, the continuing violations doctrine may apply.[138] This principle dictates that certain harms that are reoccurring in nature should not be considered individually but rather as a collective whole.[139] Thus, when applied to a crime like embezzlement, which may take days, weeks, months, or even years to fully bloom, accrual does not occur until the final petal has fully opened and the crime is considered legally "complete."[140] The same concept applies to civil claims where the initial injury is subject to continual subsequent injuries.[141]

The remaining two avenues around a statute of limitations defense are equitable estoppel and equitable tolling.[142] Equitable estoppel prevents a defendant from using the statute of limitations as a defense when the defendant's own misconduct caused the plaintiff's untimely filing.[143] Equitable tolling, on the other hand, does not require wrongful, affirmative actions on behalf of the defendant.[144] Instead, it recognizes that in certain circumstances even the most responsible and observant plaintiff will not know the source of his injury and therefore should not be denied his day in court by the statute of limitations.[145]

In *Alexander*, the Tulsa case, the plaintiffs attempted to utilize all three forms of statute-of-limitations exceptions.[146] For ex-

135. *Id.* at 86. Determining when a claim accrues will depend upon state law and the nature of the action. *Id.*

136. *Id.*

137. *Id.* (citing *Rotella v. Wood*, 528 U.S. 549, 555 (2000)).

138. *Id.* at 88.

139. *Id.*

140. *Id.* at n. 120.

141. *Id.* at 88. For example, the Supreme Court has recognized that the hostile-environment claim, a type of employment-discrimination claim, lends itself to accrual under the continuing violations doctrine. *Id.* at n. 121. This is because the unlawful act involves repeated conduct over a period of time and does not become actionable until the cumulative effect of the individual acts has occurred. *Id.*

142. *Id.* at 89.

143. *Id.*

144. *Id.*

145. *Id.* at 89–90.

146. *Alexander*, 382 F.3d at 1215–1216.

ample, one compelling argument was that due to extraordinary circumstances that existed in the aftermath of the riots, and indeed for decades afterwards, the relevant statutes of limitations should have been tolled.[147] These circumstances included especially strained race relations in the area and across the United States, drastically inferior avenues to counsel and the legal system, and a blatantly prejudiced judiciary that would have been unlikely to provide otherwise justifiable relief.[148] Ultimately, however, the court held that while tolling was appropriate for a period of time, the justifications for this tolling had largely vanished by some point in the 1960s.[149]

The plaintiffs also argued that the defendants should have been estopped from claiming a statute-of-limitations defense because, in the wake of the riots, they made various false promises about providing victims with assistance in the rebuilding process and they fraudulently concealed the true level of governmental involvement in the instigation and perpetration of riotous offenses.[150] These actions, the argument continued, kept the plaintiffs from realizing the full weight of their claim against the defendants and tolled the statute of limitations.[151] The plaintiffs proffered that the claim did not accrue, then, until an official governmental report on the incident was released in 2001, meaning that the statute of limitations had not run when the lawsuit was filed.[152] The court, however, found that various lawsuits filed against the defendant in the aftermath of the riot, although surely futile given the circumstances of the day, were evidence that there was ample information available shortly after the riot.[153] Additionally, even if this evidence was ignored, a book published by a historian in 1982 included many of the findings adopted by the official report nearly twenty years later and

147. *Id.* at 1216.
148. *Id.*
149. *Id.* at 1216–1220.
150. *Id.*
151. *Id.*
152. *Id.* at 1215.
153. *Id.* at 1218–1219. There is great irony in this stance. Essentially, the court penalized the modern plaintiffs for the courage of the few who had the wherewithal to fight the government during the height of racial hostility, even while acknowledging those lawsuits were futile from the beginning.

should have put the plaintiffs on notice of the true level of governmental culpability, thereby accruing the claim.[154]

Again, *Alexander* was something of a test case for reparations theorists and practitioners.[155] Given the strong arguments made for excepting the statute of limitations, its defeat makes it abundantly clear that some courts will be unwilling to adjudicate even Jim-Crow-era-reparations lawsuits which seek restitution for the most heinous of specifically identifiable crimes that occurred in the not-so-distant past.

IV. A SOLUTION: LEGISLATIVE GUIDANCE SO THAT REPARATIONS MAY BE LITIGATED

What is now proposed is a system where legislatures take the lead by determining which historical Jim-Crow and Civil-Rights-era tragedies should be adjudicated, as a matter of modern public policy. Legislation could then be drafted which would reinvigorate these otherwise stale claims by extending expired statutes of limitations,[156] thereby putting victims and their traceable descendants on notice of their renewed rights to pursue such claims.

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154. *Id.* at 1219–1220.

155. *See* Sebok, *supra* n. 39 (describing the case's experimental importance).

156. It is now well settled that a legislature may extend a statute of limitations in order to revitalize claims that would otherwise be time-barred, so long as that legislative body clearly articulates its intent to have the extension apply retroactively and the legislative change does not "[attach] new legal consequences to events completed before its enactment." *See* Debra Lyn Bassett, *In the Wake of* Schooner Peggy*: Deconstructing Legislative Retroactivity Analysis*, 69 U. Cin. L. Rev. 453, 489–490 (2001) (discussing a legislative body's ability to retroactively apply legislative changes); *see also* Brophy, *supra* n. 34, at 132–133 (discussing the option of legislatively extending statutes of limitations in terms of reparations litigation). The following is an explanation of statutes of limitation by the Supreme Court:

> Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. . . . They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate. . . . [T]he history of pleas of limitations shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control.

Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 264 n. 20 (1995) (Stevens & Ginsberg, JJ., dissenting) (citing *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945)). But, due to the separation of powers doctrine, legislative bodies may not retroactively apply statute of limitations extensions so as to revitalize claims which have already been followed through to final adjudication. *Id.* at 225–226 (majority).

This Section first explains why this is a desirable measure and then discusses how state legislatures could determine which historical Jim Crow offenses should be revisited through reparations litigation. It then concludes by explaining why a litigation-reparations model, such as the model pursed in *Alexander*, is preferable to a purely legislative reparations model, whereby funds are appropriated and placed in a trust from which reparations claimants could be paid, as was done for victims of Japanese internment.

A. Excepting Statutes of Limitations

Before moving on to the question of exactly how legislatures should go about extending statutes of limitations, it is important to ask a few basic questions. Namely, why should legislatures reinvigorate claims by extending the statute of limitations, and who, particularly, should be given the right to pursue reparations in modern courts?

1. Why Extend Statutes of Limitations?

There are two primary reasons why legislatures should extend statutes of limitations for certain victims of Jim-Crow- and Civil-Rights-era offenses. The first is that the typical rationales for legislatively enacting statutes of limitations do not properly apply to the types of Jim-Crow-era violations that this Article concludes should be adjudicated in modern courts. The second reason is that, at times and in various other contexts, federal and state governments have demonstrated a willingness to reopen the courts to long-since-perpetrated crimes and offenses, sometimes after pertinent statutes of limitations expired.

a. Rationales for Enforcing Statutes of Limitations Are Weak When Applied to Jim-Crow-Era Crimes

There are several traditional justifications articulated for establishing statutes of limitations. First, they endorse repose, which is to say they provide defendants with a sense of relief from the possibility that a lawsuit could be brought against them at any time, requiring them to remain prepared for legal battle in-

definitely.[157] Second, they safeguard against evidentiary difficulties that are likely to develop over time, such as fading memories, deaths of potential witnesses, and misplacement or destruction of other forms of evidence.[158] Third, they prevent plaintiffs from abusing the legal system by waiting to bring their lawsuits until the defendant is off guard and much evidence is unavailable for his defense.[159] Fourth, they promote the judiciary's legitimacy as an institution by placing limitations on the courts[160] and by encouraging immediate legal enforcement of contemporary laws.[161] Finally, they promote judicial efficiency by weeding out a whole subsection of lawsuits.[162]

These rationales do not necessarily comport well with Jim-Crow-reparations claims. First and foremost, one must consider why the claims are being brought in modern courts as opposed to those which were available when the pertinent offense was committed.[163] Again, as was acknowledged by the Tenth Circuit in *Alexander*, courts of the day were realistically shut to most Jim-Crow and Civil-Rights-era plaintiffs in the aftermath of their injuries.[164] In this sense, modern Jim Crow reparations-driven plaintiffs are unlike most civil plaintiffs who seek damages for run-of-the-mill negligence and property harms. Thus, the various

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157. *See* Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 Pac. L.J. 453, 460 (1997) (characterizing repose as "includ[ing] at least four distinct but overlapping concepts: (a) to allow peace of mind; (b) to avoid disrupting settled expectations; (c) to reduce uncertainty about the future; and (d) to reduce the cost of measures designed to guard against the risk of untimely claims").

158. *See id.* at 471 (noting that statutes of limitations prevent the deterioration of evidence from affecting a defendant's ability to mount a defense).

159. *See id.* at 483–484 (stating that statutes of limitations operate as an attempt to keep plaintiffs and defendants "on an [e]qual [f]ooting").

160. *See* Malveaux, *supra* n. 134, at 120 (characterizing statutes of limitations as promoting the perception that courts do not have "unfettered discretion, but instead are checked by clear boundaries embodied in limitations law").

161. *See* Ochoa & Wistrich, *supra* n. 157, at 492–495 (reflecting the belief that expeditious adjudication of claims against modern laws, which reflect contemporary mores and values, is desirable).

162. *See id.* at 495 (noting that statutes of limitations reduce the amount of litigation brought before the courts).

163. *See* Malveaux, *supra* n. 134, at 121 (stating "[t]he purported absurdity of seeking relief for claims so old is dissipated when one considers why it is that such claims are being brought now").

164. *See Alexander*, 382 F.3d at 1218 (acknowledging that there was "tragic" validity to the argument that the Oklahoma courts were effectively closed to victims of the Tulsa Race Riots in 1921).

arguments in favor of preventing time-barred lawsuits lose most of their validity.

The concept of repose as a justification for enforcing expired statutes of limitations is unpersuasive. Repose has been called the "principle purpose" of statutes of limitations.[165] It places a degree of responsibility on an aggrieved party by mandating that he or she take affirmative action by filing suit within a statutorily defined amount of time in order to put the defendant on guard, primarily so that the defendant will not exist in a state of uncertainty, constantly threatened by the possibility of future liability.[166] Thus, the argument in favor of applying statutes of limitations to dismiss time-barred claims presupposes irresponsibility or complacency on behalf of the plaintiff. Again, in the case of African American plaintiffs harmed by Jim-Crow-era violence and discrimination, judicially mandated compensation was generally not a viable option during the window of opportunity afforded by then pertinent statutes of limitations.[167] The justification of repose must also be weighed against other legal values—most notably that it is preferable to adjudicate claims on the substantive merits, rather than on procedural grounds.[168] When it is understood that the plaintiffs' use of judicial processes at the height of Jim Crow was futile, competing values in favor of allowing modern resolution on the merits seem to outweigh defendants' interest in repose.[169]

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165. Ochoa & Wistrich, *supra* n. 157, at 460.

166. *See id.* ("The rationale [for repose] is that it is unfair to subject an individual to the threat of being sued indefinitely.").

167. *See* Brophy, *supra* n. 34, at 103 ("Repose is a relatively weak argument when weighted against the argument that there was never an opportunity—during the statute of limitations—to challenge the defendants or hold them accountable.").

168. Ochoa & Wistrich, *supra* n. 157, at 500. There are various reasons for this preference. Most notably, the overriding purpose of establishing a legal system is to hash out disputes according to the merits of each case. *Id.* at 501. Additionally, doing so seems to "comport[ ] with fundamental notions of fairness and due process of law," in that there is great legitimacy in the idea of plaintiffs being afforded their day in court. *Id.* Also, individuals' personal dignity is at stake when claims are not heard on their merits because "[i]t is frustrating and demeaning not to be allowed to be heard when [a] person believes that he or she possesses a valid complaint." *Id.* at 501–502. This is a particularly important point when the plaintiff is the victim of Jim Crow, a formerly government-sanctioned system that inherently was an assault upon the personal dignity of those African Americans who were relegated to second-class citizenship.

169. It also should not be forgotten that there is an element of hypocrisy in removing the possibility of judicial restitution on the basis of a legislatively conceived procedural

Similarly, the argument in favor of enforcing statutes of limitations in order to prevent plaintiff misconduct is not applicable. It is not as though black defendants harmed by Jim-Crow-era perpetrators intentionally declined to assert their legal rights in order to dupe their assailants; rather, their rights, although concrete, were not recognized and protected by the judiciary and legislatures of the day.

By this same reasoning, concerns regarding the institutional legitimacy of the judiciary actually weigh in favor of extending otherwise expired statutes of limitations because "[i]f victims of injustice are selectively deprived the benefits of the laws, citizens may come to view the legal system as ineffective, unfair, and illegitimate."[170] Again, blacks who were harmed by Jim Crow typically were not afforded the ability to seek compensation in the courts. For decades, their assailants—public officials and private citizens—enjoyed life without repercussion, coexisting with their victims outside the realm of justice despite having violated laws that were on the books at the time of the offense. If there are any concerns associated with the perceived legitimacy of the legal system, those concerns must weigh in favor of extending expired statutes of limitations.[171]

Admittedly, concerns regarding evidentiary difficulties may be real. In this sense, there is a dilemma. Which seems more egregious: "unfairness to the aggrieved plaintiff or unfairness to the culpable defendant"?[172] On one hand, if the argument for enforcing statutes of limitations prevails on the basis of evidentiary difficulties, even where Jim-Crow-era plaintiffs were unable to bring their claims in a timely manner, such plaintiffs will have their rights effectively removed from the legal process—a harsh

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hurdle when the legislatures themselves were often complicit in Jim-Crow and Civil-Rights-era harms bestowed upon African Americans. After all, legislatures often either sanctioned the violence and discrimination at the heart of modern black restitution claims or remained inactive in the face of such transgressions despite their obligation to protect all citizens.

170. Malveaux, *supra* n. 134, at 83–84.

171. *See id.* at 83 (noting that while there is a need for procedural mechanisms such as statutes of limitations, "a wooden and inflexible application of such rules undermines institutional legitimacy").

172. *See id.* (concluding it may be understandable to "prioritize the injured party over the wrongdoer").

result, to be sure.[173] On the other hand, if statutes of limitations are extended, the burden of producing enough evidence to demonstrate past harm and the defendant's liability would still be on the plaintiff, and the defendant, although burdened, would be able to produce a defense centered upon a lack of evidence.[174] It seems to follow that evidentiary concerns, although legitimate, are not so great that Jim-Crow-era restitution plaintiffs should be ignored.[175]

Finally, although enforcing statutes of limitations against black plaintiffs seeking restitution would limit the number of lawsuits, an interest in such efficiency pales in comparison to the equitable arguments made in favor of permitting such claims when courts of the day were realistically closed. Admittedly, if every African American harmed by Jim Crow, either directly or indirectly through lineage, were permitted to bring a modern suit, our judiciary may become overwhelmed.[176] That, however, is not what this Article proposes. Rather, it is argued that legislatures should use several objective criteria to examine past injustices and then accordingly select individuals who should, as a matter of public policy, be permitted to bring their claims in modern courts.[177]

b. Government Pursuit and Allowance of Time-Barred and Remote Legal Claims in Other Contexts

In explaining why legislatures should extend expired statutes of limitations for certain Jim-Crow-era reparations claims, it is worth noting that federal and state governments have on occasion, and with increased frequency in recent years, elected to reopen the courts for certain victims.[178] Often, the reopening of such

173. *Id.*

174. *Id.* at 116–117.

175. *Id.*

176. The lead counsel for the victims of the Rosewood massacre recognized this possibility, and accordingly made every effort "to distinguish Rosewood as a unique event in Florida history" in order to subdue such fears. Eileen Finan, *Delayed Justice: The Rosewood Story*, 22 ABA J. Hum. Rights 8, 30 (Spring 1995).

177. *See infra* pt. IV(A)(2) (discussing the criteria legislatures should use to identify historical events and plaintiffs that are most desirable and deserving of statute-of-limitations exceptions).

178. *E.g.* Anthony V. Alfieri, *Retrying Race*, 101 Mich. L. Rev. 1141, 1159–1166 (2003) (discussing the history and phenomenon of seeking criminal prosecutions in modern courts

cases is done in the criminal context.[179] There are several good examples of race-motivated Civil-Rights-era crimes being redressed so that victims—and society at large—may realize a sense of justice.[180] Prime examples include the willingness of the state of Mississippi to reopen the case against Byron de la Beckworth for the assassination of civil rights leader Medgar Evers;[181] the voracity with which the state of Alabama and later the FBI pursued the conviction of Robert Chambliss and Thomas Blanton, Jr. years after Chambliss killed four young girls by bombing the Sixteenth Street Baptist Church in Birmingham;[182] and the recently stymied effort by the Department of Justice to indict Carolyn Bryant for the Emmett Till homicide.[183] While it is true that each of these instances of revisited criminal justice differ from what is proposed by this Article—to allow modern black plaintiffs to seek civil restitution for offenses committed during Jim Crow's reign—they nevertheless suggest that the United States Government, its state counterparts, and the citizens who support them, continue to desire solace for the most insidious offenses committed during America's tumultuous Jim Crow era. In fact, in the wake of the decision not to pursue further charges in the Emmett Till case, Congress is currently considering the passage of the Emmett Till Unsolved Civil Rights Crime Act,[184] which would appropriate $10 million to reopen, investigate, and prosecute pre-1970 homicides that were race-motivated.[185]

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for race-motivated crimes perpetrated during the Civil Rights era).

179. *Id.*

180. *Id.*

181. *See generally* Todd Taylor, *Exorcising the Ghosts of a Shameful Past: The Third Trial and Conviction of Byron de la Beckwith*, 16 B.C. Third World L.J. 359 (1996) (examining the initial two trials and acquittals of de la Beckwith, the circumstances which led to his retrial nearly thirty years later, and his ultimate conviction).

182. *See generally* Alfieri, *supra* n. 178, at 1159–1160 (discussing the case's multiple reopenings, first by state authorities, then by federal).

183. *See* Shaila Dewan, *After Inquiry, Grand Jury Refuses To Issue New Indictments in Till Case*, N.Y. Times A16 (Feb. 28, 2007) (available on Westlaw at 2007 WLNR 3825687) (reporting a Mississippi grand jury's decision not to issue new indictments for the 1955 murder of Emmett Till following the Justice Department's reopening of the case in 2004).

184. Sen. Res. 535, 110th Cong. (Feb. 8, 2007).

185. *See* Scott Turow, *Still Guilty after All These Years*, N.Y. Times § 4 (Apr. 8, 2007) (available on Westlaw at 2007 WLNR 6703914) (discussing potential ramifications of the pending legislation). Senator Chris Dodd, the bill's cosponsor, explained the importance of the bill by focusing upon general concepts of justice and morality as follows:

There have also been legislative efforts in the noncriminal context that suggest it would be appropriate and realistic to extend statutes of limitations for specific Jim-Crow-era wrongs so civil litigants may seek restitution. Most notably, in 1998, having determined that the United States Department of Agriculture (USDA) had, over a fifteen year period, systematically discriminated against black farmers who applied for loans and then ignored applicant appeals made through administrative channels, Congress legislatively tolled the pertinent two-year statute of limitations so that aggrieved farmers could bring suit.[186] As a result, a class action group of affected farmers were able to sue the USDA, ultimately settling for over one billion dollars.[187] Recent years have seen legislatures retroactively toll statutes of limita-

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> It is critically important that we work to right the wrongs of the past and bring to justice the people who perpetrated heinous crimes based solely on racial hatred. While we cannot bring back and make whole those who suffered and died at the hands of racists, we can at least reaffirm our nation's commitment to seek the truth and work to make equal justice a reality.

Official Website of Chris Dodd: United States Senator for Connecticut, *Sens. Dodd and Leahy and Reps. Lewis and Hulshof Reintroduce Emmett Till Unsolved Civil Rights Crime Act*, http://dodd.senate.gov/index.php?q=node/3736 (Feb. 8, 2007). Similarly, Representative John Lewis, one of Dodd's fellow cosponsors, endorsed the legislation for its ability to bring institutional legitimacy to the government and justice system as follows:

> These unsolved murders leave a stain on the integrity of the judicial system in America. The credibility of the government is in question here. These lingering unsolved cases lead African Americans and other citizens to wonder whether this nation is truly committed to justice or whether there are times when we find it convenient to look the other way. That is why it is so important to bring this chapter of our dark past to a close.

Id.

186. *See Agricultural, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act of 1999*, Pub. L. No. 105-277, § 741, 112 Stat. 2681 (1998) (2007) (codified at 7 U.S.C. § 2297) (tolling the statute of limitations by stating that "[t]o the extent permitted by the Constitution, any civil action to obtain relief with respect to the discrimination alleged in an eligible complaint, if commenced not later than [two] years after the date of the enactment of this Act, shall not be barred by any statute of limitations"). In order to file a claim under the exception, "farmer[s] must have filed [a] complaint of discrimination with the USDA before July 1, 1997," meaning that farmers who never challenged their loan denials through available administrative channels were left without a cause of action. *See Pigford v. Glickman*, 185 F.R.D. 82, 93 (D.D.C. 1999) (describing the eligible category of plaintiff under the statute-of-limitations exception). Governmental discrimination against black farmers and the effects of this discrimination are striking. In 1910, black farmers owned 16 million acres of farmland, and by 1920 there were about 925,000 black-owned farms in the United States. *Id.* at 85. In 1999, as a result of decades of discriminatory USDA lending practices, there were fewer than 18,000 African American farms left in the United States. *Id.*

187. Brophy, *supra* n. 34, at 132.

tions for other groups of victims as well. In particular, the California Legislature tolled otherwise expired statutes of limitations for victims of Nazi and Japanese forced slave labor during World War II[188] as well as for victims of childhood sexual abuse.[189] All of these legislative measures demonstrate that when especially invidious harms have been inflicted on identifiable individuals in the past and circumstances realistically made it difficult or impossible for those victims to pursue their legitimate claims prior to the expiration of statutes of limitations (e.g., due to racial hostilities, cover-ups, war, or childhood vulnerability and trauma), legislatures may have the wherewithal to reinvigorate those claims by extending statutes of limitations.[190]

2. Who Should Receive the Exception?

The Jim Crow era in American history was marked by thousands of injustices suffered upon blacks. Clearly, if legislatures were to reopen claims for every African American who was harmed by the period's race-motivated discrimination and violence, mass judicial chaos would ensue and financial reserves would be strained. Thus, it is important to establish criteria that legislatures could use as guidance when determining which historical tragedies most deserve reparative treatment. Building upon characteristics of the Tulsa Race Riots episode that one scholar identified as making reparations especially appropriate,[191] a variety of factors are now articulated which legislators should

188. Cal. Civ. Proc. Code Ann. § 354.6 (West 2006) (held to be unconstitutional in *Deutsch v. Turner Corp.*, 324 F.3d 692, 712–715 (9th Cir. 2003), for interfering with the federal government's sovereign right to shape foreign policy).

189. *Id.* at § 340.1 (held unconstitutional on separation of powers basis by *Perez v. Richard Roe 1*, 52 Cal. Rptr. 3d 762, 770–776 (Cal. App. 2d Dist. 2006) (finding that legislatures may change statutes of limitations and allow them to apply retroactively so as to revive claims but may not reinvigorate claims that have already received final judgments under old law)).

190. Of course, the issuance of direct legislative reparations to victims of World War II Japanese Internment—discussed *supra* note 65 and accompanying text—and to those harmed by racial hostilities in Rosewood, Florida—discussed *supra* note 37 and accompanying text—also demonstrate legislative willingness to compensate victims long after the expiration of statutes of limitations, albeit by alternative means.

191. *See* Brophy, *supra* n. 56, at 105–107 (arguing that (1) government culpability; (2) a direct link between past wrong and present living victims; (3) geographic and temporal isolation of the events; and (4) past community recognition of the moral wrong and need for compensation all weighed in favor of affording reparations).

use when determining whether to toll expired statutes of limitations.

a. Government Culpability

Often, local or state government was in some way to blame for Jim-Crow-era harms inflicted on black victims. This culpability may have manifested itself in mere inaction,[192] or it may have involved a much greater degree of official sponsorship. In the instance of the Leesburg Stockade Girls, both forms of government responsibility appear to have been present. The girls' captors and assailants were deputized authorities, not private citizens influenced by mob hysteria, demonstrating the direct culpability of local authorities.[193] Meanwhile, state officials remained inactive despite the conditions in which arrested Americus demonstrators were being held.[194] In fact, it appears the state of Georgia may actually have owned the land and stockade where the girls were held.[195] Legislatures should gauge the degree to which government was responsible for the victim's injury: the greater the culpability, the more appropriate it would be for modern government to toll statutes of limitations.

b. Direct Links between Past Wrong and Modern Claimant

Whenever a modern face can be associated with past injustice, the call to legislatively toll statutes of limitations is especially strong. Such links ensure that reparative compensation flows directly to those affected by the historical harm.[196] It also

192. For example, official findings on the mob violence that occurred in 1923 Rosewood concluded the following:

> [The local sheriff] failed to control local events and to request proper assistance from [then Florida] Governor Hardee when events moved beyond his control. While Hardee condemned the violence and ordered a special prosecutor to conduct a grand jury investigation, he did so (more than a month had passed) only after black residents were forced to leave Rosewood and their property was destroyed.

Jones et al., *supra* n. 37, at 87. Not only did local authorities remain inactive, but "[m]edia accounts at the time indicate[d] that . . . state officials were aware of the violence but did nothing to intervene." Finan, *supra* n. 176, at 9.

193. Westbrooks-Griffin, *supra* n. 11, at 16; Owens, *supra* n. 1.

194. Westbrooks-Griffin, *supra* n. 11, at 28; Owens, *supra* n. 1.

195. Telephone Interview with Van H. White, Atty. for LuLu Westbrooks-Griffin (Mar. 26, 2007).

196. In this way, one scholar has noted that reparations offer an opportunity to "bene-

demonstrates a "living connection [that] has been important in other reparations cases, such as the Japanese Americans interned during World War II, [and] provides a link between the past and present."[197] Thus, the stronger the link between the past wrong and the present claimant, the more willing legislatures should be to toll the statutes of limitations.[198]

c. Preference for Relatively Unrecorded Historical Episodes

If one of the goals of reparations is to rectify history, whereby untold stories are narrated and ignored victims are acknowledged, then it seems to follow that well-known instances of Jim Crow tragedy are not as ripe for tolling as those which history has forgotten.[199] By tolling the statutes of limitations for claims that, when filed, would precipitate increased public awareness and debate, even those claims which are ultimately unsuccessful in court for lack of admissible evidence could be viewed as successful to a certain extent. Certainly, legislatures should take this into con-

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fit[ ] subordinated communities in ways that avoid some of the pitfalls and drawbacks of affirmative action." Westley, *supra* n. 113, at 433. While the scholar argues for a more broadly-based form of black reparations than the individualized Jim Crow reparations proposed in this Article, it would seem that reparations premised upon the latter type of harm are even less susceptible to traditional affirmative-action complaints. Namely, this form of reparations allows benefits to flow directly to those individuals who can prove they themselves were harmed by particularized misdeeds. Thus, affirmative-action opponents should see this type of reparative measure as a welcome alternative to prototypical affirmative-action programs, which they argue bestow a benefit to individuals on the basis of mere group affiliation. *See e.g.* Horowitz, *supra* n. 74, at Reason Seven (characterizing slavery-based reparations as "extravagant new handout[s] that [are] only necessary because some blacks can't seem to locate the ladder of opportunity").

197. Brophy, *supra* n. 56, at 106.

198. It should not be forgotten that when speaking about Jim-Crow-era reparations, not only may the victimized individual still be alive, but the perpetrator himself may also still be alive to answer for his crime. This link between past and present should also be considered by modern legislatures.

199. For instance, America's relatively ignored history of post-emancipation public lynching has been recommended as a topic appropriate for modern reparative treatment. *See* Jordan, *supra* n. 33 (arguing race-motivated Jim Crow lynching is a better suited subject matter for black reparations than slavery and dispelling various myths concerning the topic). Additionally, it should be noted that America's dark history of race-motivated lynching, like so many forms of Jim Crow repression and violence, was not confined to the Deep South. *Id.* at 570–572. Instances of lynching were documented in the early 1900s in states as far from the Deep South as Indiana, Minnesota, Ohio, North Dakota, Maryland, Pennsylvania, and Delaware. *Id.* Additionally, Florida, not typically considered part of the Deep South, was responsible for the highest per capita rate of lynching in the United States between 1882 and 1930. *Id.* at 571–572.

sideration when selecting which claims are most preferable for tolling.

d. Miscellaneous Circumstances that Make Claims Compelling

Ultimately, because every instance of Jim Crow violence and discrimination is factually unique, there are a myriad of circumstances that could make a particular claim especially preferable for tolling treatment. For instance, the youth of the Leesburg Stockade Girls makes their story especially offensive and compelling.[200] Race-motivated Jim Crow lynching was often particularly atrocious, involving ritualistic torture whose brutality almost defies the imagination.[201] Government efforts to conceal facts—as occurred following the Tulsa Race Riots of 1921[202] as well as during decades of discriminatory lending practices by the USDA[203]—may also necessitate tolling so that victims may discover the truth through litigation. Any such facts (and more) which make specific Jim Crow harms particularly offensive could and should be reviewed by legislatures considering the enactment of tolling legislation.

B. The Litigation-Reparations Model v. the Legislative-Reparations Model

The next important question is whether the judicial system is a preferable vehicle for Jim Crow reparations, as opposed to pursuing restitution directly from the legislative process. Admittedly, a legislature that proactively resolves to revisit these historical tragedies could simply appropriate funds into a trust from which

200. Owens, *supra* n. 1.

201. *See* Jordan, *supra* n. 33, at 563–564 (describing an account of the 1934 torture and lynching of Claude Neal, which claimed he was castrated, forced to eat his own genitals and to say "he liked it," burned, cut, stabbed, and ultimately lynched slowly by raising and lowering him from the limb of a tree in order to delay death's coming and prolong his misery). For a photographic essay of America's history in lynching, see Hilton Als et al., *Without Sanctuary: Lynching Photography in America* (Twin Palms Publishers 2000). Many of the images as well as a short documentary film can be viewed at http://www.withoutsanctuary.org/main.html.

202. *See* Malveaux, *supra* n. 134, at 99–102 (describing government concealment of facts demonstrating its culpability for decades after the riots).

203. *See Pigford*, 185 F.R.D. at 88 (describing the USDA's unspoken policy of ignoring internal loan appeals made by rejected black applicants).

victims could be compensated, much like the United States Congress did in support of World War II Japanese interns and their descendants.[204] While this method has the advantage of bringing a swift and simple end to complicated instances of historical injustice, it also has several disadvantages in the context of providing reparations for Jim-Crow-era crimes.

First, and perhaps most importantly, it should not be forgotten that one goal of the reparations process is to allow the resuscitation of a historical narrative.[205] Again, many victims want, above all else, to see their stories publicly told. The arduous discovery process associated with litigation is better suited for this sleuth work than the legislative model's mere appropriation of funds, and a public trial's transparent nature would also provide a dramatic venue for each claimant's factual recitation of the events which hindered their lives.

Second, many Jim-Crow-era crimes, such as the Tulsa Race Riots, involved several dozen, if not hundreds, of victims, each with their own unique claims and losses.[206] Would it be equitable, for instance, to force the descendant of a riot victim who was tortured, murdered, and robbed to accept the same amount and form of reparations payment as the descendant of a victim who was primarily affected by Tulsa's subsequent zoning ordinances, which forced so many black families off their land? Each claim would seemingly deserve some sort of compensation, but are the two claims identical to the extent that their claimants should be forced to accept the same payment, conferred in the same form? The litigation-reparations model would allow individual claims stemming from the same historical event to be treated as unique in terms of proffering restitution awards. Of course, claimants could choose to pool their resources and litigate together, accepting the same amount and form of reparations or making any number of private settlement agreements amongst themselves,

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204. This reparative action is noted *supra* note 65.

205. "The power of historical stories is strong—they give listeners a sense of place and importance—and stories about the community will lead to a renewed sense of power and pride. The value of new and accurate accounts of past racial crimes appears to be great." Brophy, *supra* n. 34, at 12.

206. *See e.g.* Brophy, *supra* n. 56, at 59–62 (summarizing the various forms of destruction associated with the Tulsa Race Riots of 1921).

but at least the litigation model would give the victims the choice of how to proceed.

Finally, from a practical standpoint, it is more likely that the litigation model would be accepted by state legislatures. It should not be forgotten that it would ultimately be elected officials who act to revitalize claims that will potentially create renewed liability. Elected representatives may be more willing to renew reparations claims if it is not the State that will shoulder the burden of such claims alone, as would be the case with a state-funded-reparations trust fund. The litigation model would allow liability to be extended to individuals and entities, including municipalities, rather than burden a state's entire taxpayer/voter base. Additionally, the litigation model proposed by this Article would not act as a "set aside," whereby a group of people—for instance, victims of Japanese internment and their descendants—are automatically entitled to compensation. Rather, legislation revitalizing time-barred claims by extending the statute of limitations would merely revitalize stale claims. It would still be up to the plaintiff, who alleges he or she has been harmed, to prove such injury before a court of law. For many politicians (and their constituents) such a system, which leaves the burden on the claimant, may be preferable to establishing a trust.

This Article does not imply that the legislative model is without its place. In many instances, victims may understandably wish to avoid the difficult process of reliving traumatic events, but may nonetheless desire some sort of restitution from the government that inflicted their wounds or created an environment in which they were permissibly injured. Simply put, the victim may want an apology with monetary "umph" attached but may also desire a speedy closure that litigation cannot give. In these instances, the legislative model should remain a viable possibility.

V. CONCLUSION

To date, the Leesburg Stockade Girls, who like so many other black victims of Jim Crow are nearing their latter years, have yet to receive any form of restitution from the state of Georgia, and are precluded from seeking reparations by long-since expired statutes of limitations. In general, most Americans, including those who live in and around the countryside where the girls were held in 1963, remain unfamiliar with their story. Without rela-

tively swift action by concerned legislatures, time may prevent those who most deserve reparative justice from tasting its satisfaction, and stories like that of the Leesburg Stockade Girls may be forever excluded from the pages of popular history. Such a result would be a sickening end to an already exceedingly nauseating story.