

Repairing the Past: Confronting the Legacies of Slavery, Genocide, & Caste

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Institutional Atonement for Slavery: Colleges and Corporations

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Introduction

In *Atonement and Forgiveness*,¹ I observed that what I referred to therein as the “modern” black redress movement—the post-Holocaust effort by African Americans and their supporters to obtain redress for slavery and Jim Crow²—has a primary and secondary purpose. The primary purpose is to seek redress from federal or state governments for the creation, legalization, validation or sanctioning of slavery and Jim Crow (“governmental redress”).³ Indeed, most of the scholarship on the black redress movement (as well as other redress movements both domestic and international) has centered around governmental redress.⁴ So extensive is this literature and so numerous are the actual demonstrations of governmental redress that I was able to formulate a “theory of redress,” a theory that explains the conditions under which governmental redress usually occurs. Briefly, this theory posits that, whether within the United States or in other countries, successful movements for governmental redress typically have the following five characteristics: (1) redress comes from the legislature rather than the judiciary;⁵ (2) victim-groups exert political pressure on legislative bodies;⁶ (3) victim-groups are

well-organized and exhibit strong internal support for redress;⁷ (4) the asserted claims are “meritorious”;⁸ and (5) there must be an appropriate normative basis to justify “digging up” a past injustice. With regard to latter prerequisite, I have steadfastly argued that the “atonement model,” which focuses on the perpetrator’s atonement, offers a superior normative position on redress than does the “tort model,” which emphasizes the victims’ need or entitlement to compensation. The tort model may be the received tradition in the black redress movement, but the atonement model is, in my view, the model of the future. I shall return to these contraposed models in due course.

The secondary purpose of the black redress movement is to seek redress for slavery and Jim Crow from private parties, meaning institutions and families.⁹ Institutions (such as, colleges and corporations) that have profited from or contributed to slave labor or the slave trade and wealthy white families whose fortunes were built on the backs of blacks are the main targets of this secondary pursuit.¹⁰ In *Atonement and Forgiveness*, I noted that this secondary purpose has mainly focused on victim compensation pursued through litigation; in other words, that it has been implemented through the tort model rather than the atonement model.¹¹ Since the publication of *Atonement and Forgiveness*, however, there have been no dearth of significant attempts to effectuate private-party redress, mainly involving institutions, through the atonement model. This new development—institutional atonement—warrants some discussion.

In discussing institutional atonement, I do not attempt to articulate a theory of redress as I have for governmental atonement. But an examination of institutional redress through the atonement model might be an important step in that direction. I shall begin with a few examples of institutional atonement (Part I). Following that discussion, I shall distinguish the atonement model from the tort model, aligning the former with the international redress movement that has

taken shape in the aftermath of the Holocaust (Part II). Next, I shall examine the anatomy of institutional atonement (Part III), and conclude by highlighting what in my view is the social significance of institutional atonement. The conclusion will also pay a modest tribute to a fallen reparations scholar, Professor Boris I. Bittker.

I. Institutional Atonements

In Jan of 2005, J.P. Morgan Chase, the second largest bank in the country, apologized for its involvement in America's worst atrocity—the enslavement of African Americans. Two of its predecessor banks accepted thousands of black slaves as collateral for loans issued to slaveholders in Louisiana during the antebellum period. To demonstrate the sincerity of its remorse for contributing to what it called the “brutal and unjust institution” of American slavery, the bank established a \$5 million scholarship fund for blacks in Louisiana.¹²

Following on the heels of the J.P. Morgan Chase atonement, another major financial institution, Wachovia, also atoned for its ties to slavery. Wachovia issued a formal apology and backed it up with reparations. In explaining its actions, Wachovia issued the following statement:

Earlier this year, Wachovia contracted with The History Factory, a leading historical research firm, to conduct research on the predecessor institutions that, over many years, formed our company. The resulting research revealed that two of our predecessor institutions, the Georgia Railroad and Banking Company and the Bank of Charleston, owned slaves. Due to incomplete records, we cannot determine precisely how many slaves either the Georgia Railroad and Banking Company or the Bank of Charleston owned. Through specific transactional records, researchers determined that the Georgia Railroad and Banking Company owned at least 162 slaves, and the Bank of Charleston accepted at least 529 slaves as collateral on mortgaged properties or loans, and acquired an undetermined number of these individuals when customers defaulted on their loans. We are deeply saddened by these findings. We apologize to all Americans, and especially to African-Americans and people of African descent. While we can in no way atone for the past, we can learn from it, and we can continue to promote a better understanding of the African-American story, including the unique struggles, triumphs and contributions of African-Americans, and their important role in America's past and present. In this vein, Wachovia plans to partner with

community organizations that are experts in furthering awareness and education of African-American history. Our aspiration is to preserve the African-American story and ensure that this important piece of our country's history is incorporated in educational forums. This is a natural fit with our company's strong focus on diversity, education and communities.¹³

Later in the same year, the Chairman of Bank of America, Kenneth Lewis, issued the following statement: "The institution of slavery left an indelible and shameful mark on our nation's history, and we regret any actions our predecessors may have taken that supported or tolerated the institution of slavery in America." The bank pledged \$5 million to "institutions and programs involved in the preservation of African-American history."¹⁴ Although at first glance this may look like institutional atonement, it is not. The Bank of America's actions constitute nothing more than a failed attempt at institutional atonement, as I shall explain in Part III.

Another institutional atonement that took place in the year following the publication of *Atonement and Forgiveness* came from the Los Angeles Times. When reminded by filmmaker Ken Burns of a racist editorial commentary regarding Jack Johnson, the first black heavyweight champion, that ran in the Los Angeles Times on July 6, 1910, the Times editorial board "wince hard" and published an apology in the January 14, 2005, edition of its paper.¹⁵ The publisher of the Hartford Courant, Connecticut's largest newspaper, made similar amends in 2000, the same year in which its Connecticut neighbor, Aetna, Inc., one of the largest insurance companies in the United States, apologized and established a scholarship program to atone for its support of slavery. Aetna traces its roots to 1853.¹⁶

The year 2005 must be looked upon as a watershed period for institutional atonement. In no other year has there been so many institutional atonements by prominent institutions.¹⁷ But corporations are not the only institutions that have atoned or are going through a process of self-examination. Even before 2005, West Georgia College, a small liberal arts college in Georgia,

issued an apology for rejecting every African American applicant from the town's segregated high school in 1955 and 1956. To solidify its apology, the college established scholarship fund for the descendants of the 60 to 70 students who were denied admissions.¹⁸

Under the leadership of its president, Ruth Simmons, and its distinguished teacher and scholar, James Campbell, Brown University has undertaken an intensive two-year study of the slave-redress issue, including a self-examination of its involvement in slavery. Professor Campbell heads Brown University's Steering Committee on Slavery and Justice.¹⁹ The Steering Committee's website articulates the Committee's mission as follows:

Welcome to the website of Brown University's Steering Committee on Slavery and Justice. The committee was appointed in 2003 by President Ruth Simmons and charged "to organize academic events and activities that might help the nation and the Brown community think deeply, seriously, and rigorously about the questions raised" by the national debate over slavery and reparations. As an institution whose early benefactors included both slave traders and pioneering abolitionists, Brown has an intimate relationship to the history of American slavery. This history gives us, in the president's words, "a special opportunity and a special obligation" to contribute to this ongoing debate. . . . Some of . . . [the programs sponsored by the committee] will focus specifically on Brown. Others will look at questions of slavery and reparations more generally. Still others will explore the history of movements for retrospective justice in other times and places. At the conclusion of its term, the committee will submit a report to the president and to the Brown community.²⁰

What we are witnessing today is something quite extraordinary—private institutions are holding themselves accountable for the past atrocities of slavery and Jim Crow. These expressions of atonement for slavery and Jim Crow may not lend support to Socrates' claim that it is better to be the victim rather than the perpetrator of an injustice, but neither are they contrition chic or the canonization of sentimentality. Instead, institutional atonement is part of what may be the most important development in race relations since the end of the 1960's civil rights movement—to wit, the willingness of private institutions plus state and local governments to confront our racist past—slavery and Jim Crow.

The cynic might claim that these efforts at atonement are long overdue, and that some institutions have come forward only because they have been forced to do so by city ordinances requiring companies doing business in the city to investigate and disclose any profits derived from American slavery. Chicago, Los Angeles, and several other cities have such an ordinance on their books.²¹ The cynic is right on both counts; but we ought not lose sight of the big picture: institutions are attempting to make amends for their past atrocities. Some, such as the Los Angeles Times discussed earlier, have “wincing hard” at the discovery of their racist past. As Justice Felix Frankfurter once observed, “Wisdom too often never comes, and so one ought not to reject it merely because it comes late.”

Atonement is, in fact, a complex matrix of guilt and deep humility, penitence and reconciliation. Atonement improves the institution’s spirit and sense of good will as well as the nation’s health. It raises the moral threshold of our society. It gives African Americans a reason to want to *invest* in America. Behind many institutional income statements or balance sheets stand warm-blooded individuals who are concerned about the country—indeed the world—in which they live.

Those who atone on behalf of their institutions have come to understand that slavery is the source of the deep disadvantages African Americans continue to encounter in the 21st century. Two-and-one-quarter centuries of human bondage created capital deficiencies among the slaves and free blacks alike. Financial capital deficiencies (investments and property), human capital deficiencies (formal education and skills), and social capital deficiencies (public respect, networking, and the ability to get things done) all took hold during slavery.

The fear that some private institutional managers have is that coming forward with evidence of past wrongdoing might invite a lawsuit now or in the future. Indeed, rather than

being praised for its atonement, Aetna was slapped with a civil rights lawsuit. Many lawsuits have in fact been filed against other corporations as well. These lawsuits are misguided, in my view, not because they face insurmountable legal barriers, such as running afoul of applicable statutes of limitations, but because they are confrontational rather than conciliatory. The past speaks to the present, but it need not speak so harshly.²²

II The Atonement Model v. The Tort Model

Institutional redress, like governmental redress, can be pursued through the tort model as well as the atonement model. The tort model primarily seeks victim compensation, and sometimes punishment. It exaggerates or inflates the contentiousness of reparations discourse. Although largely adjudicatory, the tort model can be pursued through legislation wherein the emphasis is on victim compensation.²³ It is this victim-centered approach to redress that gives the tort model its most distinctive feature.

Although I am not a strong proponent of the tort model, I do concede that, in its litigation mode, the tort model offers a powerful normative argument. It argues that if judges do not find creative ways to bend procedural rules that deny redress for the past atrocity of slavery, then “the extant law stands as the ‘present embodiment’ of America’s worst atrocity and the corrupt laws that made it possible.” Slave-redress litigation, in other words, provides a credibility check on current U.S. law “no less important than the Supreme Court’s landmark 1954 school desegregation case of *Brown v. Board of Education*.²⁴ These cases should succeed “because of their connection to the past, not in spite of that connection.”²⁵

In contrast to the tort model, the atonement model focuses less on the victim than on the perpetrator. It seeks to establish conditions necessary for moral clarity and the prospect of repairing a broken relationship between the perpetrator and victims of an atrocity. Under the

atonement model, the victim seeks a genuine apology from the perpetrator, first and foremost, and then calculates the sincerity of the apology by the weight of the reparations. If the reparations are sufficient, the perpetrator reclaims its moral character in the aftermath of an atrocity, and the victim forgives and moves forward with the perpetrator into a new, healthier relationship. But if the reparations are insufficient to make the apology believable, there is no redemption, no forgiveness, and, consequently, no repair of a broken relationship—no reconciliation.²⁶

To sum up: the tort model is backward-looking, victim-focused, and compensatory; the atonement model is forward-looking, perpetrator-focused, and racially conciliatory.²⁷

More broadly, the atonement model attempts to position the black redress movement within the larger international redress movement that has evolved in the half century after World War II. The argument here is important—to wit, there is a fundamental nexus between, on the one hand, a government that would exterminate millions of Jews or permit the sexual enslavement of thousands of teenage girls (some as young as 12 years old) and, on the other hand, a government that would enslave millions of blacks over 2 ¼ centuries—breaking up families and raping young women—and then spend another 100 years persecuting these innocent people. In each case, *the perpetrator does not identify with the victim*. In each case, the perpetrator sees the victim as something other than a person of equal moral standing.²⁸

This absence of identity is the essential mechanism that gives rise to any atrocity. It is the essential deliction that underpins each claim for redress. How is it that a Nazi officer (Otto Ohlendorf), a man with degrees in engineering and law, a father of six, a deacon in his church, an outstanding member of his community can be responsible for the murder of more than a thousand Jews.²⁹ How is it that Japanese soldiers can march into Nanjing, the capital of China

prior to World War II, and within the space of a few months kill more people than the number of people that died in Hiroshima, tossing babies in the air and catching them on their bayonets?³⁰ It is because in each case *the perpetrator does not identify with the victim*.

In short, the atonement model, in my view, offers a superior reason for redressing past human injustice or atrocities. The atonement model is superior to the tort model because it attempts to point the crusade for slave redress in the right direction. It does so by embracing a post- Holocaust vision of heightened morality, identity egalitarianism, and restorative justice.

III The Anatomy of Atonement

Not every attempt by institutions to redress a past injustice or atrocity qualifies as an atonement. Although motivated by other factors, the institution that atones, like the government that atones, must have a desire to establish or re-establish its moral character. The perpetrator of an injustice or atrocity must regard atonement as a way in which it may learn of its guilt and repent. The atoning perpetrator must regard the wrongdoing as substantial rather than trivial.

Atonement, in fact, is comprised of two elements: apology and reparations. An apology is not a punishment for guilt, but rather an acknowledgement of guilt. When the perpetrator of an injustice or atrocity apologizes, it does four things: confesses the deed, admits that the deed constitutes a human injustice or atrocity, repents (or expresses remorse), and asks for forgiveness. All four ingredients are preconditions for taking personal responsibility.³¹

Under this formula, the Bank of America's apology for its ties to slavery, discussed in Part I, is not genuine; it does not constitute an "apology." By insisting that none of its predecessor institutions profited from slavery, "although some did business with slave owners" (mainly by accepting slaves as collateral for loans), the Bank of America undercuts the confessional quality of its apology. The apology it tenders looks more like an excuse or an

attempt to mitigate culpability than an effort to accept full responsibility. A more remorseful apology would focus on the fact that the bank's predecessor institutions did business with slaveowners. That fact alone seems dispositive. The fact that the bank's predecessor institutions did not profit from any deals with slaveowners should be stated for the purpose of creating an accurate historical record. But that fact does not overshadow the fact that the bank's predecessor institutions had dealings with slaveowners, thus supporting slavery. In contrast, J.P. Morgan Chase, whose predecessor institutions also accepted slaves as collateral, expressed remorse for that particular tie to the "brutal and unjust institution" of slavery, and made no attempt to mitigate its culpability.

So far as I can tell, none of the institutional atonements tendered thus far satisfy the fourth element of what I regard as a genuine apology. Asking for forgiveness is a relatively new element in my definition of an apology. I had not always considered it necessary for the perpetrator to ask for forgiveness. But, as I explained on another occasion, I was persuaded of the error of my position by another reparations scholar: "I found Elie Wiesel's rabbinical reflections on the matter to be most persuasive." At a ceremony dedicating the Holocaust Remembrance site at the Brandenburg Gate in Berlin, "Mr. Weisel concluded by urging Parliament to pass a resolution formally requesting, in the name of Germany, the forgiveness of the Jewish people for the crimes of Hitler. 'Do it publicly,' he said. 'Ask the Jewish people to forgive Germany for what the Third Reich had done in Germany's name. Do it, and the significance of this day will acquire a higher level. Do it, for we desperately want to have hope for this new century.'" ³² Thus, "[s]eeking forgiveness enriches the moral quality of the apology. It makes the apology more believable." ³³

Clarification of the historical record is a necessary condition for the tender of an apology. It is, in fact, implicit in the notion of an apology, as it provides a factual foundation for the apology. “Clarification results in a collective judgment regarding the magnitude of the injustice, including its lingering effects, and the extent of the perpetrator’s responsibility.”³⁴

The second step in the atonement process is the reparation. “The perpetrator of an atrocity cannot expiate the sin it has committed against an innocent people until it has undertaken a great and heroic task of redemption. That task of redemption is a reparation.”³⁵ Thus, a reparation has a special ontology. It concretizes the apology, makes it believable. “It is the act that transforms the rhetoric of apology into a meaningful, material reality.” I define a reparation as “the revelation and realization of [an] apology.”³⁶

Reparations are by nature asymmetrical, meaning only victims of the atrocity are eligible to receive them. Making reparations available to nonvictims, such as on the basis of financial need, undercuts their special nature. It takes them out of context and, thereby, changes the nature of the injustice or atrocity to which they are responsive.

Finally, reparations come in many forms. Some are compensatory (going directly to the victims or their families) while others are rehabilitative (going to the victims’ community in an effort to rebuild or refurbish). Within these categories, some reparations are monetary (such as unrestricted or restricted cash payments) and others are nonmonetary (museums or monuments). Most of the reparations paid by atoning institutions are monetary rehabilitative, such as scholarship programs for African Americans or contributions to black historical groups. The range of reparations pretty depends upon the limits of our imagination.

Conclusion

The year 2005 will go down as an important year in reparations discourse, not only because of the number of institutional atonements that have taken place but also for a far less

celebratory reason. Professor Boris I. Bittker, the nation's foremost tax law scholar who taught me not only tax law some 30 years ago at Yale Law School, but also advised me early in my career to broaden my range of scholarship from corporate law to civil rights law and to take on the reparations question in my scholarship, died that year. Professor Bittker was himself an eclectic scholar. He did not allow the color of his skin (white) to stop him from researching and writing boldly about racial justice. He was one of the first major scholars to give the reparations question a serious look. Inspired by Gunnar Myrdal's seminal work, *An American Dilemma*, Professor Bittker labeled the issue of black reparations the "second American dilemma." In his 1973 book *The Case for Black Reparations*,³⁷ Professor Bittker used his considerable legal skills to advance an argument in favor of black reparations based not on slavery but on the legacy of school segregation. He believed a legally sustainable case for black reparations could be based on Jim Crow rather than on slavery. Yet, he happily embraced the writings of his former student who, disagreeing with his teacher, argued for a moral rather than a legal approach to redress for both slavery and Jim Crow. He proudly and loudly endorsed all my writings on reparations, and even collaborated with me on an essay---we had found common ground. I would like to think that were he alive today he would likewise endorse this paper's inquiry into institutional atonement.

Institutional atonement, to be sure, lends support to the idea in which Professor Bittker so strongly believed---to wit, reparations discourse can be used to initiate a new and productive discussion of the American race problem. At first glance, using the reparations question as a jumping-off point for a productive discussion of racial justice might seem inadvisable, because the question of black reparations has thus far been fraught with no dearth of controversy. I believe, however, that much of the controversy (with all due respect to Professor Bittker) is

centered on the received tradition, the tort model, which Professor Bittker has worked so hard to advance. The tort model is a backward-looking, victim-focused, compensatory approach to reparations. I rejected that normative model in *Atonement and Forgiveness*, and continue to do so here, in favor of the atonement model's forward-looking, perpetrator-focused, racially conciliatory approach to reparations. The atonement model, however, emerges less from the black ethos than from the post-Holocaust writings and actions of the international human rights community.

I should like to end by tentatively suggesting that there are perhaps two reasons a private institution should atone for supporting or profiting from slavery. Both reasons are implicit in the atonement model's forward-looking vision. The first reason is to repair the institution's moral character damaged by the disclosed affiliation. Without "wincing hard" and taking this action, the perpetrator cannot claim to have moral standing in our society. The second reason is to begin the process of repairing the institution's relationship to black America damaged by the disclosed affiliation. Without the institution's atonement, African Americans can never respect or forgive the institution and, as a consequence, a healthy relationship between the two can never be maintained or take shape. Society at large is diminished by the absence of such a relationship.

¹ Roy L. Brooks, *Atonement and Forgiveness: A New Model for Black Reparations* (Berkeley: University of California Press, 2004).

² In my view, Congressman John Conyers' slave-redress bill, HR 40, which was first introduced in Congress in 1989, marks the beginning of the modern black redress movement. HR 40 called for a congressional study of the slave-redress question. The bill was patterned after the approach Congress took in studying the redress claims of Japanese Americans who were summarily subjected to removal and internment during World War II. The latter study paved the way for the federal government's atonement implemented in the Civil Liberties Act of 1988. Inspired by the German government's largely positive response to the redress claims of Holocaust victims, the Civil Liberties Act contained the United States government's apology and provided reparations for Japanese American victims of internment. For a more detailed discussion, see Brooks, *Atonement and Forgiveness*, pp. 11-13. The bill itself can be found in John Conyers, "The Commission to Study Reparations Proposals," in *When Sorry Isn't Enough: The Controversy over Apologies and Reparations for Human Injustice*, ed. Roy L. Brooks (New York: NYU Press, 1999), p. 367. For an examination of the German reparations program, see *When Sorry Isn't Enough*, ed. Brooks, Part 2.

³ See Brooks, *Atonement and Forgiveness*, pp. 1-3.

⁴ I collect much of this scholarship in Roy L. Brooks, “Getting Reparations for Slavery Right: A Response to Posner and Vermeule,” *Notre Dame Law Review* 80 (2004): 251, 252 n.7 (responding to Eric Posner & Adrian Vermeule, “Reparations for Slavery and Other Historical Injustices,” *Columbia Law Review* 103 (2003): 689).

⁵ Legislatures have more authority to act than do courts. Chief Justice John Marshall, the first great justice of the United States Supreme Court set the international judicial tone in *The Cherokee Nation v. Georgia*, 30 U.S. 1 (1831), when he wrote: “If it be true that the Cherokee Nation have rights, this is not the tribunal in which these rights are to be asserted. If it be true that wrongs have been inflicted, and still greater are to be apprehended, this is not the tribunal which can redress the past or prevent the future.” *Ibid*, p. 20.

⁶ Despite having little political capital (due to their small population and relative political apathy), Japanese Americans had sufficient social capital (they knew how to get things done) to muster political pressure on Congress for passage of the Civil Liberties Act of 1988. In *When Sorry Isn't Enough*, the passage of this legislation is referred to as “a historic legislative achievement” because:

. . . Few Americans realize how difficult it is to pass legislation, how inaccessible Washington is to the average citizen. In *Arrogant Capital* (1994), political analyst Kevin Phillips argues that our law-makers are mired in bureaucracy, captured by well-financed special interests groups who can influence the outcome of elections. Japanese Americans did not fit into this world in the 1980s. They were a numerical minority (less than 1% of the population), politically inactive as a group, and divided over whether to pursue a legislative or judicial route in the fight for redress. In addition, as the redress movement reached its peak in the 1980s, the federal budget deficit was nearing an all-time high, further dimming the prospects of an expensive reparations package. By all accounts, the Japanese American redress movement should have failed, much like the African American redress movement for slavery and Jim Crow, or, at best, it should have gained only marginal success, similar to the Native American redress movement. Why was it successful? How were Japanese Americans able to break through the political barriers that have stymied other groups? What conditions are constitutive of a successful redress movement in the American political system?

Roy L. Brooks, “Japanese American Redress and the American Political Process: A Unique Achievement,” in *When Sorry Isn't Enough*, ed. Brooks, pp. 159-160. In answering these questions, one of the contributors to *When Sorry Isn't Enough*, Leslie Hatamiya, argued, *inter alia*, that “the redress bill became a ‘free vote.’ Veterans groups did not actively oppose the bill primarily because of the remarkable war record of Japanese American veterans (the *Nikei* soldier), who fought valiantly for a country that held their parents captive. The only group that opposed the redress movement, the Americans for Historical Accuracy, lacked sufficient credibility to mount a threatening campaign. Their claim that internment was brought about not by racism but by military necessity was thoroughly rejected in CWRIC Report [the congressional study of internment] and various judicial proceedings regarding the internment matter. Thus, members of Congress were able to vote their conscience, without fear of paying a price at the polls.” *Ibid*, p. 160. See Leslie Hatamiya, “Institutions and Interest Groups: Understanding the Passage of the Japanese American Redress Bill,” in *When Sorry Isn't Enough*, ed. Brooks, pp. 159-160.

⁷ Although Nazi persecution of Gypsies is well-documented, it is speculated that Gypsies have been marginalized from the mainstream reparations movement regarding Nazi persecution because they have not been as well-organized as Jewish groups whose claims have dominated the redress movement for Nazi persecution. See Roy L. Brooks, “A Reparations Success Story?,” in *When Sorry Isn't Enough*, ed. Brooks, p. 19.

⁸ The definition of a “meritorious” redress claim is quite a contentious matter. The definition can have anywhere from two to five elements: (a) the wrongdoing must be extraordinary—a human injustice or atrocity; (b) the wrongdoing must be well-documented; (c) the victims must be an identifiable group, although this may not always be the case; (d) the victims must continue to suffer, although this too is debatable; and (e) the victims’ suffering (if required) must be connected to the perpetrator’s past injustice. Although an absolute element of a meritorious redress claim, what constitutes an extraordinary act of wrongdoing is highly contentious. On the one hand, I have argued that an extraordinary act of wrongdoing must relate to the commission of a large-scale human injustice recognized under international law. Genocide, slavery, torture, and mass rape are clear examples of a human injustice. Yet, international law also proscribes arbitrary detention. This, of course, means the internment of Japanese Americans counts as a human injustice. But some human rights scholars would not regard the internment of Japanese Americans to be a human injustice, at least not one warranting reparations. Thus, they find the definition of “human injustice” I offer in *When Sorry Isn't Enough*—the suppression of human rights or human freedoms afforded under International Law—to be too liberal. For purposes of reparations discourse, they would define a human injustice as an “atrocity”; that is, as a gross violation of human rights, a morally indefensible act waged

against a large number of people. An atrocity is so heinous, so unspeakable, that it is virtually indefinable. But in my view, the internment of Japanese American does constitute an atrocity. What is clear is that defining the first element of a meritorious claim is not as easy to resolve as Justice Stewart's definition of pornography. Justice Stewart once said that pornography may be difficult to define, but "I know it when I see it."

⁹ See Brooks, *Atonement and Forgiveness*, p. 3.

¹⁰ Many blacks today can, in fact, trace their roots back to specific plantation families whose descendants are alive today. Alex Haley's seminal work *Roots* (1976) and, on the other side of the color line, Edward Ball's national bestseller *Slaves in the Family* (1998) illustrate these intergenerational, cross-racial connections. Gwendolyn Hall, a private historian, has gone Haley and Ball one better. She has created a data base detailing 161 years of slavery in Louisiana. Everything from slave names, genders, ages, occupations, family relations, and illnesses to the prices paid by slave owners and emancipation records is documented on a CD-ROM located at Louisiana State University. For further discussion about Hall's collection, see Jeffrey Ghannam, "Repairing the Past," *American Bar Association Journal*, November 2000, p.39.

¹¹ See Brooks, *Atonement and Forgiveness*, ch. 4.

¹² See, e.g., Chris Sanders, "JP Morgan Says Predecessor Banks Owned Slaves," [Reuters News@reuters.com](http://www.reuters.com) (available, Jan. 12, 2005); "J.P. Morgan Finds It Had Ties to Slavery," *Chicago Tribune*, Section 3 (Business), Jan. 21, 2005, p. 3.

¹³ <http://www.wachovia.com/misc/0,,877,00.html> (available Oct. 2, 2005).

¹⁴ Gary Washburn, "Bank of America Insists It Did Not Profit Off Slavery; It Will Give \$5 million to Historical Groups," *Chicago Tribune*, Metro, Aug.25, 2005, p. 2.

¹⁵ See "Same on Us," *Los Angeles Times*, January 14, 2005, p. B12.

¹⁶ See Brooks, *Atonement and Forgiveness*, p. 15.

¹⁷ Several important governmental redresses, some atonements, also took place in 2005. The Senate apologized "to the victims of lynching and the descendants of those victims for the failure of the Senate to enact anti-lynching legislation." S. Res. 39, 109th Cong. 1st Sess. (Feb. 7, 2005). The resolution, however, passed by voice vote so that legislators would not have to go on record. Eight republican senators, including Senator Trent Lott, did not sign on to the resolution. See, e.g., Sheryl Gay Stolberg, "The Senate Apologies, Mostly," *New York Times* 1 (Main), June 19, 2005, at p. 3. The state of Virginia announced in 2005 that it will provide up to \$5,500 a year in scholarships for any state resident who was denied an education during the period of Jim Crow when many black public schools throughout the state were closed rather than integrated pursuant to the decree issued in *Brown v. Board of Education*. What makes this expression of governmental redress interesting is the fact that John Kluge, a billionaire media investor, provided a \$1 million dollar donation to this endeavor. See, e.g., Michael Janofsky, "A New Hope for Dreams Suspended by Segregation," *New York Times* § 1 (Main), July 31, 2005, p. 1.

¹⁸ See *ibid.*, p. 261 n33.

¹⁹ See, e.g., "Brooke Donald, Brown to Probe Past Links to Slave Owners," *San Diego Union-Tribune*, Mar. 22, 2004, p. A3.

²⁰ http://www.brown.edu/Research/Slavery_Justice/ (available Oct. 2, 2005).

²¹ See Brooks, *Atonement and Forgiveness*, pp. 15-16.

²² For a more detailed discussion of these lawsuits, see Brooks, *Atonement and Forgiveness*, ch 4.

²³ For a discussion of the legislative form of the tort model, see *ibid.*, p. 98.

²⁴ See *ibid.*, pp. 137-138.

²⁵ *Ibid.*, p. 127.

²⁶ See *ibid.*, ch 5.

²⁷ See *ibid.*, chs. 4 & 5.

²⁸ See *When Sorry Isn't Enough*, ed. Brooks, chs 2 (Jews), 3 (comfort women), 6 (Jim Crow) & 7 (slavery).

²⁹ See "Putative national Security Defense: Extracts from the Testimony of Nazi SS Group Leader Otto Ohlendorf," in *When Sorry Isn't Enough*, ed. Brooks, p. 51.

³⁰ See Iris Chang, "The Nanking Massacre," in *When Sorry Isn't Enough*, ed. Brooks, p. 104.

³¹ See Brooks, *Atonement and Forgiveness*, p. 144.

³² *Ibid.*, pp. 146-147.

³³ *Ibid.*, p. 147.

³⁴ *Ibid.*, p. 148.

³⁵ *Ibid.*, p. 155.

³⁶ *Ibid.*

³⁷ Boris I. Bittker, *The Case for Black Reparations* (New York: Random House, 1973, republished Beacon Press, 2003).