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# DESTABILIZING THE NORMALIZATION OF RURAL BLACK LAND LOSS: A CRITICAL ROLE FOR LEGAL EMPIRICISM

THOMAS W. MITCHELL\*

## INTRODUCTION

*"I am an invisible man. No, I am not a spook like those who haunted Edgar Allan Poe; nor am I one of your Hollywood-movie ectoplasms. I am a man of substance, of flesh and bone, fiber and liquids—and I might even be said to possess a mind. I am invisible, understand, simply because people refuse to see me."<sup>1</sup>*

Just like the unnamed narrator in Ralph Ellison's *Invisible Man*, black rural property owners have been mostly invisible to the wider society within the United States. Although books, films, and television series featuring white American families of modest means who acquired homesteads in the late nineteenth and early twentieth century have helped make the stories of white homesteaders a part of the American folkloric tradition,<sup>2</sup> the even more remarkable and improbable history of

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\* Associate Professor, DePaul University College of Law and Assistant Professor, University of Wisconsin Law School. I'd like to thank the organizers of the New Legal Realism conference for inviting me to present my research at that conference and the Ford Foundation for its generous support of my research on black land loss. I would like to acknowledge Suzette McInerney in particular for providing excellent research assistance throughout the development of this Article, as well as Amanda Tady for her research assistance. I'd also like to recognize Scott Bernstein from my research team for his work in analyzing much of our preliminary data, some of which is reported herein. Further, I'd like to acknowledge the generosity of the Concerned Citizens of Tillery and Gary Grant in particular for truly invaluable assistance, especially as it relates to helping my research team better understand the history of Tillery Farms and in identifying the very existence of the Roanoke Farms section that made this comparative study possible in the first place. In the same spirit, I'd like to thank Bentley Mohorn and family for their generosity in helping me better understand the history of the Roanoke Farms section of the resettlement project and for the hospitality this family has shown my research team on our different visits to Halifax County. I'd also like to thank my wife, Lisa Alexander, for carefully reviewing an earlier draft of this Article and for providing me with helpful, sage advice throughout. Finally, I'd like to thank the staff and editors of the *Wisconsin Law Review* for their excellent and detailed work in editing this Article.

1. RALPH ELLISON, *INVISIBLE MAN* 3 (Vintage Int'l 2d ed. 1995) (1947).

2. A classic example of a story about the life of white homesteaders in the late 1800s that has been phenomenally popular in more than one medium of entertainment is *Little House on the Prairie*. LAURA INGALLS WILDER, *LITTLE HOUSE ON THE PRAIRIE* (1935). The book *Little House on the Prairie* was the third in an eight-part autobiographical series of "Little House" books authored by Laura Ingalls Wilder.

black landowners who acquired millions of acres of land just a few short years after the end of the Civil War has garnered comparatively little interest or attention among the general public or within the entertainment industry.<sup>3</sup> This may be explained by the fact that the very idea that black people may own any substantial assets runs counter to the longstanding stereotypical image of the deeply impoverished African American that different mediums of popular culture have helped reinforce.<sup>4</sup>

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Francis M. Nevins, *Little Copyright Dispute on the Prairie: Unbumping the Will of Laura Ingalls Wilder*, 44 ST. LOUIS U. L.J. 919, 923 (2000). The "Little House" books have sold more than sixty million copies worldwide and have never been out of print. Carolyn C. Jones, *Mapping Tax Narratives*, 73 TUL. L. REV. 653, 673 (1998). The "Little House" books served as the basis for the extraordinarily popular television series—featuring characters that became cultural icons—that ran from 1974 to 1983. Nevins, *supra*, at 923.

3. The lack of general interest in the story of black farmers and homesteaders is not based upon any shortage of interesting characters or historic material. The homesteading story alone of the historic novelist and filmmaker Oscar Micheaux—who remains the most prolific black filmmaker in American history if not the most prolific independent filmmaker ever in American cinema—would provide ample material for a feature film or television series. See AfricanAmericans.com, Oscar Micheaux, at <http://www.africanamericans.com/OscarMicheaux.htm>. Born near Metropolis, Illinois, in 1884, in 1904 Micheaux purchased land that had been opened up to settlement on the Rosebud Indian Reservation in South Dakota, possibly becoming "one of the only African Americans attempting to acquire an allotment from the Rosebud Sioux Reservation." Dan Moos, *Reclaiming the Frontier: Oscar Micheaux as Black Turnerian*, 36 AFR. AM. REV. 357, 362–63 (2002). Ultimately, he expanded his homestead to 500 acres. [http://www.producersguild.org/pg/awards\\_a/oscarbio.asp](http://www.producersguild.org/pg/awards_a/oscarbio.asp). In 1917, he published a novel called *The Homesteader* that spawned his first film (also called *The Homesteader*), "the first full-length feature film directed, written, and produced" in American history by an African American. AfricanAmericans.com, *supra*. By no means does Micheaux stand alone, as thousands of African Americans moved to the West after the end of Reconstruction in order to homestead and establish several all-black towns. Moos, *supra*, at 363–65. Although there has not been deep interest in the stories of black homesteaders, there have been some critically acclaimed works of art that have drawn upon black homesteading themes. See, e.g., PEARL CLEAGE, *FLYIN' WEST AND OTHER PLAYS* (1999) (featuring the story of four black women homesteaders in Kansas in late 1800s); DAVID ANTHONY DURHAM, *GABRIEL'S STORY* (2001) (exploring the lives of a black family that moves from Baltimore to a Kansas homestead in the early 1870s in search of a better life).

4. See DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 4 (1992). Immensely popular television shows such as *Good Times*, which aired for five years and told the story of a black family living in tenement housing on the south side of Chicago, have reinforced negative stereotypes of African Americans as being economically destitute and lazy. See Leonard M. Baynes, *Racial Stereotypes, Broadcast Corporations, and the Business Judgment Rule*, 37 U. RICH. L. REV. 819, 836–37 (2003).

At the same time, those who criticize the one-sided portrayals of African Americans in the media do not deny that fundamental economic differences do exist between whites and blacks. There is a yawning wealth gap between black and white families in the United States that has been growing wider in recent years. *Study Says*

Such one-dimensional views of African Americans can be understood as a legacy of certain popular nineteenth century ideologies. Both prior to and after the Civil War, whites from across the political spectrum were pessimistic about the ability of black people to survive in this country as free people, survival being defined either in an absolute sense<sup>5</sup> or survival defined as being self-reliant and autonomous economic actors.<sup>6</sup> Perhaps due to the overall societal lack of interest in the subject of black property owners, few legal academics have considered the history and experiences of black rural property owners to be an important topic in its own right, in spite of the fact that the law has played a powerful role in shaping the destiny of many black landowners. Although the record is uneven, the law has shaped property ownership in a way that has often injured the black landowner.

Many black rural property owners have lost their property as a result of various legal processes that have culminated in the forced sale of black-owned property. Three years ago, I published an article in the *Northwestern University Law Review* that, among other things, addressed one such legal process identified as a significant source of involuntary land loss by activists and public interest lawyers who work to promote land retention within the African American community.<sup>7</sup> That legal process is the partition sale of black-owned property owned

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*White Families' Wealth Advantage Has Grown*, N.Y. TIMES, Oct. 18, 2004, at A13. Recent analysis of governmental data demonstrates that, in 2002, white households had a median net worth of more than \$88,000. *Id.* The median net worth for black households stood at approximately \$6000. *Id.* In sum, the median net worth for black households in 2002 was less than 7% of the median net worth of the average white household in that year. *See id.* One can see how this wealth gap has increased over a relatively short period of time by comparing similar net worth figures from 1988. In 1988, white households had a median net worth of \$43,800, while black households had a median net worth of \$3700. MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* 86 (1997). Therefore, the median net worth for black households in 1988 was almost 8.5% of the median net worth for white households in that year. *See id.*

5. *See* GEORGE M. FREDRICKSON, *THE BLACK IMAGE IN THE WHITE MIND: THE DEBATE ON AFRO-AMERICAN CHARACTER AND DESTINY, 1817-1914*, at 154, 158, 163, 229-30 (1971).

6. *See id.* at 179-80. At the very least, it is likely that most people today assume that enslaved African Americans did not own any property prior to being emancipated from slavery. Recent scholarship by Professor Dylan Penningroth that analyzes claims filed in the Southern Claims Commission, however, has carefully detailed the manner in which a number of African American slaves, in fact, owned some property during the period of slavery. *See* DYLAN C. PENNINGROTH, *THE CLAIMS OF KINFOLK: AFRICAN AMERICAN PROPERTY AND COMMUNITY IN THE NINETEENTH-CENTURY SOUTH* (2003).

7. Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community Through Partition Sales of Tenancies in Common*, 95 Nw. U. L. REV. 505 (2001).

under the tenancy in common form of ownership.<sup>8</sup> In doing research for that article, however, I discovered that there was very little data about such partition sales to analyze, whether one defines data as case law, quantitative figures, or qualitative information. Such sparse data made it difficult to evaluate some of the competing claims that some have made about the impact partition sales have had upon black landowners. For the most part, I qualified any claims I made about partition sales that lacked empirical support. However, upon review of that article, I realized that there were a few instances in which I simply reiterated unqualified claims made by others that lacked much empirical support.<sup>9</sup>

The quality of the extant data made it nearly impossible to assess many of the broad claims that some had made about the economic impact of partition sales generally, and that others had made with respect to the impact upon black assets, and wealth more specifically. Further, it was impossible to get any traction on some related, but unexplored auxiliary issues due to the problems with the lack of data.<sup>10</sup> Unexplored questions such as the nature and scope of the transaction costs associated with the typical partition sale and the conditions under which the public auctions are conducted are fundamental to evaluating some of the competing normative claims that some legal commentators and activists have made in arguing for or against a legal regime in which partition sale requests are granted liberally. Knowledge of the real

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8. *See id.*

9. For example, I claimed that "courts now order partition sale in almost every case." *Id.* at 513. For support for this statement, I cited to several leading property law treatises. *See id.* at 514 n.41. However, I cannot independently verify these claims, and I am not sure how the authors of these treatises came to this conclusion. Later in the article, I claimed that "thousands of black families have lost their land due to partition sales, many of which were initiated by outsiders who acquired an interest in a tenancy in common with the sole intention of forcing a sale." *Id.* at 579. Because there were not any quantitative empirical studies that have evaluated the degree to which various forced sale processes—including partition sales—have been utilized in cases in which black landowners have lost their property, my sources for this statement were southern, grassroots activists who have worked on behalf of black farmers and landowners for decades. For example, I interviewed Edward ("Jerry") Pennick, the director of the Land Assistance Fund, which is part of the Federation of Southern Cooperatives/Land Assistance Fund. He reiterated to me that large numbers of black landowners had lost their land due to partition sales, confirming a statement that he had made in 1985 to a law student at Boston College Law School who wrote a student note on the topic. *See id.* at 511 n.28 (citing John G. Casagrande Jr., Note, *Acquiring Property Through Forced Partitioning Sales: Abuses and Remedies*, 27 B.C. L. REV. 755, 756 n.9 (1986)).

10. For example, there was no data on how much money black landowners typically spent on attorneys' fees and court costs in attempting to fight a request for a partition sale initiated by one of the tenants in common. Such data would better enable researchers to evaluate the wealth impacts of court-ordered partition sales, even assuming that such sales were conducted under robust market conditions that fetched full market value prices.

world economic consequences of forced sales is especially important given the fact that partition sales undercut individual property rights as such rights have been classically framed and understood.<sup>11</sup>

In an effort to produce scholarship on the topic of black land loss that would rest upon a firmer empirical foundation, I applied for and received a grant from the Ford Foundation to conduct a three-year empirical study of forced sales of black-owned property in the rural South.<sup>12</sup> In addition to me, my research team consists of two real estate economists and a graduate student in environmental studies.<sup>13</sup> This Article demonstrates why it has been important to conduct empirical work on forced sales of black-owned rural property, and will discuss the methodology I have used in studying this area of the law that most legal scholars have neglected.

Part I provides a brief overview of the history of black rural property acquisition and loss over the course of the past 140 years. This Part demonstrates that the dispossession of rural property owned by African Americans is not an exclusively distant and tragic phenomenon. Significant dispossession has taken place in the past twenty years, and such dispossession continues to this very day.

Part II highlights the fact that few legal scholars have conducted research on black land loss<sup>14</sup> or have otherwise addressed these issues in their textbooks or course offerings. Such lack of attention simply overlooks the fact that many of the issues impacting black rural property owners raise very important doctrinal matters in a number of substantive areas of law. Further, the very silent treatment legal scholars have

11. See Richard A. Epstein, *A Clear View of The Cathedral: The Dominance of Property Rules*, 106 YALE L.J. 2091, 2095–2105 (1997). See generally Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972) (distinguishing between property rules that provide one with the right to keep their property against the wishes of third parties and liability rules that permit the involuntary sale of one's assets to third parties upon payment to the owner of the fair market value of the asset).

12. See Ctr. for the Study of Race, Politics and Culture, Univ. of Chi., Directory: 2003–2004 Resident Fellows, Thomas Mitchell, at [http://csrpc.uchicago.edu/fellows\\_0203.shtml](http://csrpc.uchicago.edu/fellows_0203.shtml) (last visited May 17, 2005). The Ford Foundation grant (number 1020-0207) is entitled “Forced Sales of Black-Owned Land in the Rural South: Assessing Impacts on Black Wealth and Effects on African-American Participation in Civil Society.”

13. These economists are Professor Stephen Malpezzi (chair of the Department of Real Estate and Urban Land Economics at the University of Wisconsin-Madison School of Business) and Professor Richard Green (the Oliver T. Carr Chair of Real Estate and Finance at the George Washington University School of Business). Scott Bernstein—the graduate student working on the project—is a student at the Institute for Environmental Studies at the University of Wisconsin-Madison.

14. In this Article, I will sometimes refer to the decline in black rural property ownership as “black land loss” because this is how most people who are not property scholars discuss the phenomenon.

given to this issue has contributed to normalizing the process of the dispossession of black-owned rural property holdings.

Part III provides an overview of the type of data that is currently available to social scientists and legal scholars with an interest in studying rural property ownership in general, and black rural property ownership in particular. This Part makes clear that there are real limitations with respect to the data upon which those who have written on the topic of black landownership have most often relied. In addition, this Part reviews the limited nature of sources available to legal scholars interested in studying particular legal processes that have contributed to black land loss.

Part IV reveals that certain academics and activists have drawn conclusions in an empirical vacuum about certain legal processes that have been used to force sales of black-owned property. As a case study, this Part will consider some of the claims made with respect to partition sales of black-owned rural property, a legal process that has been cited by some as a leading cause of involuntary black land loss.<sup>15</sup> In this Part, I describe the negative ramifications of making claims—whether claims made by academics or activists—related to black land loss with insufficient empirical support.

Part V addresses the methodology I have used for researching black land loss matters under the research project, sponsored by the Ford Foundation, that I am managing as the principal investigator at this time. This research project has sought to combine quantitative and qualitative research. Methodologically, I have been taking a “bottom-up” approach, largely out of necessity.<sup>16</sup> This Part also discusses the nature of the relationship I have attempted to build with the communities at my field site in rural North Carolina. This Part further reveals some of the early findings of our research project, demonstrating the comparative advantage of using a New Legal Realism approach to studying legal issues as it relates to topics such as black land loss that would be much

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15. See, e.g., Joseph Brooks, *The Emergency Land Fund: A Rural Land Retention and Development Model*, in *THE BLACK RURAL LANDOWNER—ENDANGERED SPECIES: SOCIAL, POLITICAL, AND ECONOMIC IMPLICATIONS* 117, 121 (Leo McGee & Robert Boone eds., 1979) [hereinafter *BLACK RURAL LANDOWNER*].

16. The “bottom-up” terminology is borrowed from the founders of the New Legal Realism project. Among other things, this research methodology attempts to use methods, including “data-gathering methods that permit accurate understandings of law in people’s everyday lives and experiences.” See Am. Bar Found. & Univ. of Wis. Law Sch., *New Legal Realism: Social Science/Law/Policy*, at <http://www.newlegalrealism.org/>. In my research project, my research team has spent months collecting data on property transactions in a rural county registry of deeds office in one of the poorest counties in North Carolina. We decided on this bottom-up approach because there was almost no reported case law addressing the research issues on black land loss that we are evaluating.

more difficult to explore in any depth using more traditional methods alone.

### I. BLACK RURAL PROPERTY ACQUISITION AND LOSS: A BRIEF OVERVIEW

Agricultural census records reveal that by 1910, African American farm families had acquired between sixteen and nineteen million acres of agricultural land in rural America, with the ownership heavily concentrated in the South.<sup>17</sup> Admittedly, this group of black farm owners, a group that constituted roughly 25% of all black farm operators by 1910,<sup>18</sup> was exceptional, as most black people working in agriculture in the rural South during this time period were trapped in the lower rungs of the tenure ladder.<sup>19</sup> Over the course of the past 100 years, however, the small class of black people who owned rural property, which was located mostly in the rural South, dwindled to the point that some of those writing on the topic began in the 1970s to refer to the remaining black rural landowners as an “endangered species.”<sup>20</sup>

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17. The U.S. Department of Agriculture (USDA) first published data on the color of farm operators in its *1900 Census of Agriculture*. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *THE STATISTICAL HISTORY OF THE UNITED STATES FROM COLONIAL TIMES TO THE PRESENT* 258 (1965) [hereinafter *STATISTICAL HISTORY OF THE UNITED STATES*]. At least through the 1945 agricultural census, “Negroes, Indians, Chinese, Japanese and other nonwhite races” were classified as nonwhite; in contrast, Mexican American farm operators were classified as white during this time period. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *HISTORICAL STATISTICS OF THE UNITED STATES 1789-1945: A SUPPLEMENT OF THE STATISTICAL ABSTRACT OF THE UNITED STATES* 75-76 (1949). The 1910 agricultural census reveals that 15,961,506 acres of farmland were farmed by 175,290 nonwhite full owners and 3,114,957 acres of farmland were farmed by 43,177 nonwhite part owners. 2 UNITED STATES CENSUS OF AGRICULTURE: 1954, at 954, 956 (1956). With respect to part owners—whether white or nonwhite—the census does not break out the number of acres that these part owners actually own as opposed to rent. Further, in 1910, 893,370 of the 920,883 nonwhite farm operators accounted for in the agricultural census were black farm operators. *Id.* at 1057. Therefore, in 1910, one can assume that black farmland owners owned almost all of the farmland that was owned by nonwhite farm operators assuming that the ratio of black owners to nonwhite owners overall was roughly the same as the ratio of black farm operators to nonwhite farm operators.

18. WILLIAM H. HARRIS, *THE HARDER WE RUN: BLACK WORKERS SINCE THE CIVIL WAR* 31 (1982).

19. PHILIP S. FONER, *ORGANIZED LABOR AND THE BLACK WORKER: 1619-1973*, at 120 (1974); cf. PETE DANIEL, *THE SHADOW OF SLAVERY: PEONAGE IN THE SOUTH 1901-1969* (1972) (noting that many black laborers after the Civil War became mired in debt and became subject to a system of debt peonage that in many ways resembled labor conditions under slavery).

20. See generally *BLACK RURAL LANDOWNER*, *supra* note 15. Use of this “endangered species” terminology was obviously drawn from the Endangered Species Act of 1973 that was enacted in order to protect species of fish, wildlife and plants that were listed as either threatened or endangered. See Pub. L. No. 93-205, 87 Stat. 884



The trend in black land ownership from the 1970s to the present has not been encouraging. The U.S. Department of Agriculture's (USDA) *1997 Census of Agriculture* indicated that 16,560 black farmers owned 1,499,083 acres of land.<sup>21</sup> Therefore, by the end of the twentieth century, black farm operators as a group had lost more than 90% of the land that their predecessors had acquired by 1910.

There are a number of historical, economic, and legal forces that have contributed to the decline of black rural landownership in the past eighty to ninety years. These forces include the migration of African Americans out of the rural South, which picked up steam after 1920,<sup>22</sup> including the migration of some who gave up farmland they owned as a result of violence and intimidation.<sup>23</sup> More generally, the dramatic consolidation within the agricultural sector over the past several decades has resulted in small farm operators being forced out of business at a much higher rate than larger farm operators.<sup>24</sup> This squeezing out of small farmers has contributed to the trend of black land loss because small farm operators as a group have always included a disproportionate

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(codified at 16 U.S.C. §§ 1531–1534 (2000)). Those who began to refer to black landowners as an endangered species were obviously seeking to garner public and political support for initiatives—including legislative initiatives—that would make black landownership more stable and viable into the future. See CIVIL RIGHTS ACTION TEAM, U.S. DEP'T OF AGRIC., *CIVIL RIGHTS AT THE UNITED STATES DEPARTMENT OF AGRICULTURE* 14 (1997).

21. NAT'L AGRIC. STATISTICS SERV., U.S. DEP'T OF AGRIC., *1997 CENSUS OF AGRICULTURE* 25 tbl.7 (1999) [hereinafter *1997 CENSUS OF AGRICULTURE*], available at <http://www.nass.usda.gov/census/index1997.htm>. The most recent census of agriculture was conducted in 2002, and it indicates that 26,488 black farmers own 2,196,264 acres of land. NAT'L AGRIC. STATISTICS SERV., U.S. DEP'T OF AGRIC., *2002 CENSUS OF AGRICULTURE* 48 tbl.47 (2004) [hereinafter *2002 CENSUS OF AGRICULTURE*], available at <http://www.nass.usda.gov/census/>. In fact, there has not been a spike in the number of acres black farmers now own. Instead, the National Agricultural Statistics Service has changed its methodology for calculating the number of farms in operation and the number of acres farmed by employing a different sampling technique designed to account for farms that earlier censuses missed. See Press Release, National Agricultural Statistics Service, U.S. Department of Agriculture, *NASS To Issue Improved 2002 Census of Agriculture Data* (June 3, 2004), available at <http://www.usda.gov/nass/events/news/methodology.htm>.

22. REYNOLDS FARLEY & WALTER R. ALLEN, *NAT'L COMM. FOR RESEARCH ON THE 1980 CENSUS, THE COLOR LINE AND THE QUALITY OF LIFE IN AMERICA* 112–13 & 113 tbl.5.1 (1987).

23. Todd Lewan & Dolores Barclay, *Landownership Made Blacks Targets of Violence and Murder*, ASSOC. PRESS (2001), at <http://www.mamiwata.com/murder.html>.

24. See DAVID ORDEN ET AL., *POLICY REFORM IN AMERICAN AGRICULTURE: ANALYSIS AND PROGNOSIS* 26 (1999) ("Modernization required that individual farmers either 'get big or get out.' Between the 1940s and the 1990s the number of independent farm operations fell from just over six million to around two million . . .") (footnote omitted).

number of black farm operators.<sup>25</sup> Macroeconomic forces alone, however, do not fully explain the sharp drop in black farm operations because a higher percentage of small black farming operations have been driven out of business than small white farming operations.<sup>26</sup>

In talks I have given addressing the subject of black land acquisition in which I highlight the fact that black people acquired millions of acres of property after the end of the Civil War, many people in the audiences

25. See Loren Schwenger, *A Vanishing Breed: Black Farm Owners in the South, 1651-1982*, AGRIC. HIST., Summer 1989, at 41, 43, 47-48. The most recent census of agriculture—the *2002 Census of Agriculture*—reveals that there are 2,128,982 farm operations in the United States. 2002 CENSUS OF AGRICULTURE, *supra* note 21, at 9 tbl.3. Of these farm operations, 2,067,379 are run by white farm operators and 29,090 are run by black farm operators. *Id.* at 48 tbl.47. Overall, there are 1,227,971 farm operations that can be considered very small given that the market value of the agricultural products sold from these farms is less than \$10,000 per farm. *Id.* at 9 tbl.3. These farms constitute almost 58% of the total number of farm operations in the country. See *id.* Of these small farm operations, there are 1,184,715 small white farm operations that constitute almost 56% of the total number of white farm operations. *Id.* at 48 tbl.47. In contrast, 23,480 of the total number of black farm operations have annual sales of less than \$10,000; these small black farm operators constitute almost 81% of all black farm operations. See *id.* At the other end of the scale, there are 457,736 white farm operations with sales of \$50,000 or more; these white farm operations constitute over 22% of all white farm operations. *Id.* There are 1432 black farm operations with sales of \$50,000 or more; these black farm operations constitute less than 5% of all black farm operations. See *id.*

26. It should be noted that the statistics that demonstrate that a much higher percentage of black farm operations are very small as compared to white farm operations do not address the reasons that these farm operations are so small in the first place. Just as discrimination has driven many black farm operations out of business altogether, it has limited the ability of other farm operations to expand, making these farm operations vulnerable to the economic pressures that are forcing more and more small farm operations out of business. See *Pigford v. Glickman*, 185 F.R.D. 82, 87-88, 103-04 (D.D.C. 1999). This fact appears to have been overlooked by scholars such as Professors Hanoch Dagan and Michael A. Heller, who “suspect that in a regression analysis, farm size would statistically explain most of the decline: Similar-sized white-owned farms and solely-owned black farms have also largely disappeared.” Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 YALE L.J. 549, 604 (2001). Causal claims such as these that suggest that the sharp decline in black farm operations is primarily a function of farm size operation fail to take account of the fact that farm size operation in itself can be a function of an intervening variable, that is, race discrimination. See CIVIL RIGHTS ACTION TEAM, *supra* note 20, at 21-22.

These reports suggest that the disparity in participation and treatment of nonminority and minority farmers may be partially accounted for by the smaller average size of minority- and female-operated farms, their lower average crop yields, and their greater likelihood not to plant program crops, as well as less sophisticated technology, insufficient collateral, poor cash flow, and poor credit ratings.

However, representatives of minority and female farm groups point out that previous discrimination in USDA programs has helped to produce these very conditions now used to explain disparate treatment.

I have addressed have mistakenly assumed that black rural property owners as a group must have lost all of their property holdings many, many decades ago during the heyday of Jim Crow. Although this assumption is understandable, it is wrong. Even in recent decades, many black rural property owners have claimed that their landholdings have been targeted by whites seeking to gain ownership of their property.<sup>27</sup> In many instances, these black landowners, as well as organizations committed to promoting black land retention, have claimed that land speculators have often been successful in initiating various legal actions with the sole purpose of acquiring black-owned property against the wishes of the black landowners.<sup>28</sup> Black landowners have claimed that these legal actions (typically actions litigated in state courts) often culminate in court-ordered forced sales that transfer property from blacks to whites.<sup>29</sup> According to those with much experience working on behalf of black landowners, the legal proceedings in which black property owners have lost their property involuntarily include partition sales, tax sales, foreclosures, adverse possessions, and takings.<sup>30</sup>

The legitimacy of these claims has not been widely contested and much of the available evidence supports these claims. Black farmers, for example, claim that they have lost hundreds of thousands of acres in the past few decades as a direct result of the discriminatory practices of employees and agents of the USDA.<sup>31</sup> The Civil Rights Action Team, appointed in 1996 by former Secretary of Agriculture Dan Glickman, concluded in its final report that the farmers' claims were well-founded: "[m]inority farmers have lost significant amounts of land and potential farm income as a result of [USDA] discrimination."<sup>32</sup> The land that

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27. See Todd Lewan & Dolores Barclay, *'They Stole Our Land'*, TENNESSEAN, Dec. 9, 2001, at 21A. With respect to the land involved in the black land loss cases the Associated Press (AP) investigated, "virtually all of this property, valued at tens of millions of dollars, is owned by whites or by corporations." *Id.*

28. Brooks, *supra* note 15, at 121.

29. See Todd Lewan & Dolores Barclay, *Court Proceedings Put Acres on the Auction Block*, MILWAUKEE J. SENTINEL, Dec. 9, 2001, at 8A.

30. See, e.g., THE EMERGENCY LAND FUND, INC., THE IMPACT OF HEIR PROPERTY ON BLACK RURAL LAND TENURE IN THE SOUTHEASTERN REGION OF THE UNITED STATES 251-80 (1980) [hereinafter EMERGENCY LAND FUND]; see also BLACK ECON. RESEARCH CTR., ONLY SIX MILLION ACRES: THE DECLINE OF BLACK OWNED LAND IN THE RURAL SOUTH 50-51 (Robert S. Browne ed., 1973) [hereinafter ONLY SIX MILLION ACRES]; *Introduction to BLACK RURAL LANDOWNER*, *supra* note 15, at xix-xx. Foreclosure, as exemplified by the experiences that black farmers have had with the USDA, has often been the by-product of race discrimination. See CIVIL RIGHTS ACTION TEAM, *supra* note 20, at 15-16.

31. See CIVIL RIGHTS ACTION TEAM, *supra* note 20, at 2-4, 13-16.

32. *Id.* at 30.

these financially hobbled black farmers ultimately lost was often sold at foreclosure sales.<sup>33</sup>

Further, in December of 2001, the Associated Press (AP) published an award-winning three-part series entitled *Torn from the Land*, which was the result of an eighteen-month long investigation into black land loss in the South.<sup>34</sup> The investigative reporters for this series documented 107 cases in which 406 black rural property owners lost more than 24,000 acres of farm and timber land by force, intimidation, or legal chicanery.<sup>35</sup> Although many of the land loss cases that the AP writers documented involved events that took place in the first half of the twentieth century,<sup>36</sup> several of these cases involved court-ordered forced sales that occurred within the past twenty to thirty years.<sup>37</sup> Well-known organizations and public interest law firms that serve black landowners and farmers claim, according to the AP, that in recent years, thousands of black landowners experiencing property retention problems have sought their assistance;<sup>38</sup> unfortunately for these property owners, these organizations lack the capacity, in large part, to handle these cases. In some of the more recent cases that the AP writers investigated, state courts have, in effect, legitimated the questionable ethical practices of those with no moral qualms about preying upon black property owners made vulnerable by their age, race, health, or education.<sup>39</sup>

33. *Id.* at 15–16

34. Lewan & Barclay, *supra* note 27, at 21A; Todd Lewan & Dolores Barclay, *Torn from the Land: Black Americans' Farmland Taken Through Cheating, Intimidation, Even Murder* (pt. 1), ASSOC. PRESS (Dec. 2, 2001), available at <http://www.commondreams.org/headlines01/1202-03.htm>. In 2001, this series won the Aronson Award for Social Justice Journalism. See Hunter College, City Univ. of N.Y., *Associated Press Wins 2001 Aronson Award for Social Justice Journalism for Series "Torn from the Land"*, at [http://www.hunter.cuny.edu/advancement/publicrelations/news/2002/Aronson\\_Award\\_2001/aronson\\_award\\_2001.html](http://www.hunter.cuny.edu/advancement/publicrelations/news/2002/Aronson_Award_2001/aronson_award_2001.html). In 2002, the New York Association of Black Journalists ("NYABJ") awarded the AP the Griot Award (in the category of public affairs)—NYABJ's highest award—for the AP's *Torn from the Land* series. See N.Y. Ass'n of Black Journalists, NYABJ 2002 Journalism Awards, at [http://www.nyabj.org/awards\\_winners.html#Newspapers%20Over](http://www.nyabj.org/awards_winners.html#Newspapers%20Over).

35. Lewan & Barclay, *supra* note 27, at 21A; Lewan & Barclay, *supra* note 34.

36. See Lewan & Barclay, *supra* note 27, at 21A; Lewan & Barclay, *supra* note 34.

37. See, e.g., Todd Lewan & Dolores Barclay, *Quirk in Law Strips Blacks of Land*, TENNESSEAN, Dec. 11, 2001, at 8A.

38. Todd Lewan & Dolores Barclay, *AP Documents Land Taken from Blacks Through Trickery, Violence and Murder*, ASSOC. PRESS (2001), available at <http://www.mamiwata.com/trick.html> (noting the large number of complaints regarding black land loss received by the Land Loss Prevention Project in North Carolina, and the Federation of Southern Cooperatives/Land Assistance Fund in Atlanta, Georgia).

39. See, e.g., Lewan & Barclay, *supra* note 37, at 8A.

## II. FEW LEGAL SCHOLARS HAVE CONDUCTED RESEARCH ON BLACK LAND LOSS ALTHOUGH OPPORTUNITIES FOR SUCH RESEARCH ABOUND

Some anthropologists, sociologists, economists, historians, and other nonlegal scholars have published articles and books addressing issues pertaining to black rural property ownership;<sup>40</sup> however, there has

In the 1990s, a South Carolina real estate trader named Audrey Moffitt sought a 335-acre estate in Jasper County, S.C., that had been owned by the Beckett family since 1873.

Frances Beckett, a 74-year-old widow with a fourth-grade education, was one of 76 heirs to the estate. According to court papers, she was bedridden with terminal cancer.

The dying woman accepted Moffitt's offer of \$750 for her 1/72 interest—worth \$4,653, according to a subsequent appraisal by a real estate consultant. An appeals court would later call it the only "true" appraisal of the property.

Moffitt then bought out six other heirs for a total of \$6,600, court papers show. Among them, she paid Edward Stewart, 88, a man with no formal education, and Flemon Woods, 80, with a third-grade education, a combined \$5,800 for their one-sixth interest. It was worth \$55,833, according to the subsequent appraisal.

Moffitt filed her partition action in January 1991. Beckett family members countersued, alleging Moffitt had secured the elderly heirs' signatures improperly. A special referee in the Court of Common Pleas ruled that the estate should be sold.

The property was broken into two pieces that were auctioned separately. Fifty acres were purchased by a real estate broker for \$75,000 at a December 1991 sale. Of this, \$12,864 went to Moffitt for her shares and nearly \$20,000 was taken for court costs, leaving \$42,331 for the family. Today, the 50 acres are assessed at \$200,000.

Moffitt bought the remaining 285 acres for \$146,000 in February 1992. (That included \$24,338 she paid to herself for her own shares.)

Two years later, however, an appeals court ruled that the signatures of the elderly Beckett heirs were obtained illegally and called Moffitt's dealings with them "unconscionable."

When Moffitt paid an additional \$45,075 for the shares, however, the court validated the partition sale.

With the additional payment, Moffitt's outlay for the land totaled \$198,425, court papers show. Deduct the \$37,202 she received from the partition sales for her own shares of the estate, and her true outlay was \$161,223.

Moffitt has since broken up the property and resold it to a locally prominent family and several area businesses, records show. Her proceeds, property records show, total \$1,708,117—nearly 11 times what she paid for the property.

*Id.*

40. See, e.g., BLACK RURAL LANDOWNER, *supra* note 15; ONLY SIX MILLION ACRES, *supra* note 30; LOREN SCHWENINGER, BLACK PROPERTY OWNERS IN THE SOUTH: 1790-1915 (1990); Debra A. Reid, *African Americans and Land Loss in Texas: Government Duplicity and Discrimination Based on Race and Class*, 77 AGRIC. HIST.

been little systematic, empirical study of the topic.<sup>41</sup> Given the number of legal issues involved in many black land loss cases, one could reasonably expect that more than a handful of legal scholars would have published articles addressing any number of the legal topics that are implicated.<sup>42</sup> In contrast to the AP investigative series on black land loss (picked up by newspapers all across the country and often on the front page), and reports produced by some community-based organizations that have addressed legal proceedings of one kind or another that have been used to force sales of black-owned property, few legal scholars have considered the “legal dispossession” of black-owned property holdings to be an area worthy of independent study. This fits a general pattern in which there has been a lack of mainstream interest within legal academia with respect to issues addressing the dispossession of property from people of color, more broadly, within the United States.<sup>43</sup>

There are a number of possible explanations for the limited attention legal scholars have paid to the issue of black land loss. First, property rights of people of color have often been understood to be contingent so that the dispossession of their property does not run counter to many people’s settled expectations.<sup>44</sup> Moreover, the issues that impact rural Americans are often overlooked and are overshadowed by the issues that impact those who live in metropolitan areas, perhaps due to the fact that the metropolitan population now accounts for eighty

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258 (2003); Michael D. Schulman et al., *Problems of Landownership and Inheritance Among Black Smallholders*, AGRIC. & HUM. VALUES, Summer 1985, at 40; Spencer D. Wood & Jess Gilbert, *Returning African-American Farmers to the Land: Recent Trends and a Policy Rationale*, REV. BLACK POL. ECON., Spring 2000, at 43; Robert Zabawa, *The Black Farmer and Land in South-Central Alabama: Strategies to Preserve a Scarce Resource*, 19 HUM. ECOLOGY 61 (1991).

41. Cf. Schwenger, *supra* note 25, at 42.

42. To name just a few, some of the substantive areas include tax, property, trust and estates, civil procedure, and remedies.

43. For example, little legal scholarship has focused upon the history of Chicana/o property dispossession. See Guadalupe T. Luna, *Chicana/Chicano Land Tenure in the Agrarian Domain: On the Edge of a “Naked Knife”*, 4 MICH. J. RACE & L. 39, 41–42 (1998).

This Article investigates the dispossession of Chicanas/Chicanos from their property interests following the war between the United States and the Republic of Mexico (“U.S.-Mexico War”). The admission, by at least one federal court, of the widespread abuses that occurred during the nineteenth century suggests that one might reasonably expect to find some mention of them within traditional legal education in the contemporary period. Not only were these actions the type of “abuses” that often attract at least academic discussion, they also constituted the means by which private citizens gained title to vast amounts of rural property. Nevertheless, legal scholarship and classroom discussions are virtually silent on the matter.

*Id.* at 41–42. (emphasis added) (footnotes omitted).

44. See *infra* note 51 and accompanying text.

percent of the total population in the United States.<sup>45</sup> Consistent with this general bias, law schools and legal academics operate under an urban bias.<sup>46</sup> The law schools that are located in states with significant rural populations are not typically ranked very highly, or considered “elite” or “national” law schools.<sup>47</sup> Most law professors attended law school in urban schools, and most of those who practiced as lawyers worked in urban settings.<sup>48</sup> This urban bias even manifests itself in clinical legal education due to the fact that those who are considered to be leading clinicians and leading clinical theorists are overwhelmingly located in urban areas.<sup>49</sup> Therefore, legal issues that specifically impact rural constituencies in their everyday lives have not captured the attention of most law professors, irrespective of whether these professors are doctrinal professors or clinical legal faculty.

However, there are also some more mundane explanations for the very limited treatment that legal scholars have devoted to the topic of black rural property ownership. One of the major impediments to those who might be interested in conducting careful empirical studies on more specific aspects of black property ownership is that conducting such studies can be extremely time-intensive, laborious, and expensive, because there is not a central database that researchers can access. Further, gaining leverage on the issue almost requires sociolegal research, as the very limited data currently available restricts the number of observations one can make on black rural property ownership patterns. Legal scholars skilled only in conducting traditional legal research who do not seek to collaborate with others experienced in other research methods work at a severe disadvantage when attempting to research understudied topics such as black land loss, given the lack of case law on the topic.

Given that publications primarily addressing issues pertaining to the dispossession of black rural property owners exist on the outer fringes of property scholarship, no scholarly debates between any property scholars have been generated. The absence of an engaged scholarly dialectic on this issue has provided little spark for those legal scholars who might otherwise be inspired to undertake in-depth legal and sociolegal research projects on any number of interesting, but unexplored, topics addressing the property retention struggles of black rural landowners. Although one might reasonably assume that property

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45. See Debra Lyn Bassett, *Ruralism*, 88 IOWA L. REV. 273, 275–85 (2003).

46. Beth Lyon, *The Importance of Service to Rural Minority Communities: Constructing a Rural Clinic* 5 (Oct. 8, 2004) (unpublished manuscript, on file with author).

47. Daniel M. Filler & Laura McNally, *Training the Small Town Lawyer* 4 n.6 (Oct. 11, 2004) (unpublished manuscript, on file with author).

48. Lyon, *supra* note 46, at 5.

49. See Filler & McNally, *supra* note 47, at 23–24.

scholars in particular might take some interest in this area given the numerous property issues involved, the legal issues facing black landowners also raise interesting issues in the areas of civil procedure, tax, wills and estates, business organizations, corporations, and environmental law, to name a few.

Such lack of legal and sociolegal scholarship has resulted in missed opportunities to explore any number of important topics. These topics include analyses of the relationship between asset holdings and poverty,<sup>50</sup> and further study on the manner in which property rights are socially constructed. With respect to the latter topic, for example, the law has often treated minorities as deviant property owners, undeserving of the full set of legal entitlements that traditional property rhetoric normally enshrines.<sup>51</sup> Such a construction and treatment is not inevitable. If few legal scholars highlight the disparate treatment minority property owners receive, however, then patterns of subordination and domination are more easily reproduced.

Two legal scholars who have used the topic of black land loss as a case study in an article addressing common property issues more broadly have—perhaps unintentionally—further entrenched the notion that black rural property owners possess only contingent claims to their property. In their article addressing the “liberal commons,” Professors Michael Heller and Hanoch Dagan use the example of black landowners in a “tentative spirit . . . to illustrate how the liberal commons approach helps frame new questions, provoke research, and suggest attractive reforms” as it applies to stabilizing “property future,” the real subject of their concern.<sup>52</sup> Heller and Dagan acknowledge that property laws governing tenancies in common have not worked well for black rural landowners; however, they strongly suggest that the demise of the black rural landowner is inevitable, if tragic.<sup>53</sup>

Heller and Dagan advocate for property law reform that they believe would benefit others who own common assets. In contrast, they

50. This issue is growing in importance given the widening black-white wealth gap. See *supra* note 4 and accompanying text.

51. See, e.g., *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 590 (1823) (“[T]he tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness . . . .”); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1729–30 (1993) (stating that “[a]lthough the existence of certain property rights may seem self-evident and the protection of certain expectations may seem essential for social stability, property is a legal construct by which selected private interests are protected and upheld”) (footnote omitted); Luna, *supra* note 43, at 46 (discussing the racist theory that maintained that the cultural imperfections of Mexicans led to their being dispossessed of their property after the signing of the Treaty of Guadalupe Hidalgo).

52. Dagan & Heller, *supra* note 26, at 551, 604.

53. See *id.*



claim that legal reforms designed to promote African American property retention would have likely failed, given that the “effects of poverty and race discrimination have been such that black farmers would likely have been done out of their land (by loan sharks and other scam artists) even if the law . . . had been more favorable.”<sup>54</sup> The implications of this statement are huge and exceedingly pessimistic—that is, although property law can and should be reformed to help secure other people’s property rights, such an effort to reform property law to support black land retention would be ineffective because black landowners as a group are destined to be scammed out of their land through legal and extralegal means.<sup>55</sup> Despite the magnitude of this assertion, Heller and Dagan offer no empirical support for this sweeping claim. Further, they claim that legal reform would likely have had minimal impact given the way that law impacts behavior in their view.<sup>56</sup> They offer no empirical

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54. *Id.* First, it should be noted that not all black farmers are similarly situated in terms of their economic status; there are some black farming operations that generate significant income. *See supra* note 25. More broadly, it should be noted that the effects of longstanding poverty and race discrimination have long worked to the disadvantage of African Americans. Instead of perceiving such poverty and discrimination as inevitable and irremediable, such conditions have often served as motivation for lawyers seeking to reform the law so that it better serves African Americans. *Cf.* Harold A. McDougall, *For Critical Race Practitioners*, 46 *How. L.J.* 1, 44 (2002) (reviewing DERRICK A. BELL, JR., *RACE, RACISM AND AMERICAN LAW* (4th ed. 2000).

To begin, a focus on the limitations of litigation and on the stubbornly racist beliefs of individuals is a necessary, but not sufficient, approach to train law students how to struggle against racism in the modern world. To preserve African Americans as a people, and to facilitate their growth and development, requires a broader focus. Our challenge is to implement, as well as invent, the strategies and tactics of social change necessary to achieve these ends.

*Id.*

55. *See Dagan & Heller, supra* note 26, at 604. This statement also suggests that all of the hard work done by organizations such as the Land Loss Prevention Project (a well-respected public interest law firm in Durham, North Carolina, that serves African American landowners), the Federation of Southern Cooperatives/Land Assistance Fund (an organization based in Georgia that has worked on behalf of black farmers and landowners since the days of the Civil Rights Movement), and the Black Farmers and Agriculturalists Association (an advocacy group with chapters throughout the South) is for naught. These organizations have won many battles and lost several others; however, each of them is still quite viable, and each remains committed to using whatever strategies it can—including strategies that seek a variety of legal reforms—to support black rural farmers and rural property owners. *See Black Farmers & Agriculturalists Association, at* <http://www.coax.net/people/lwf/bfaa.htm> (last visited May 17, 2005); Federation of Southern Cooperatives/Land Assistance Fund, *at* <http://www.federationsoutherncoop.com/> (last visited May 17, 2005); Land Loss Prevention Project, *at* <http://www.landloss.org/cases.htm> (last visited May 17, 2005).

56. *See Dagan & Heller, supra* note 26, at 604. Taken to its logical extreme, these fatalistic statements suggest that the law has little role to play in improving the ability of those negatively impacted by poverty and race discrimination to retain their assets and wealth. Experience has taught those who have worked to better the conditions

support, or even any citations, for this broad statement that is used to bolster their argument that reform of the legal rules governing tenancies in common would have minimal impact with respect to helping black rural property owners.<sup>57</sup> More generally, Heller and Dagan suggest that property law scholarship focused primarily upon black rural landowners would have limited appeal and significance.<sup>58</sup> After all, they suggest that nothing can be done because, in their view, the day of the black rural property owner has come and gone:

Black rural landownership may seem a dusty topic, peopled with hardscrabble tales of property past. Consider, though, the daunting possibility that property future—think biomedical research, post-apartheid restitution, hybrid residential associations, perhaps cyberspace—may have the same analytic structure, be subject to a similar punishing legal regime, and face the same fate as the black rural landowner.<sup>59</sup>

Overall, views such as those expressed by Heller and Dagan with respect to the issue of black land loss help “normalize” or make appear

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of African Americans and others in the United States that the court system—although a helpful institution at times—is often not sufficient by itself to bring about significant social uplift. See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 336–43 (1991); Derrick Bell, *Getting Beyond a Property in Race*, 1 WASH. U. J.L. & POL’Y 27, 35 (1999). However, the sentiment that law more generally can play little, or no, role in improving the status of African Americans would be rejected by those who have worked long and hard to use the law—as one tool among many others—to improve the social, political, and economic status of African Americans.

57. See Dagan & Heller, *supra* note 26, at 604.

58. See *id.* at 551.

59. *Id.* It seems odd, on one hand, to gloss over any discussion of legal reform strategies that could serve black rural landowners based upon the perceived exceptionalism of black landowners, but then to drum up scary images of “property future” facing the same ends as the black rural landowner, based merely upon the fact that “property past” and “property future” have similar analytic structures. According to Heller and Dagan, one of the key factors that has led to the decline of black landowners is the combined effects of race discrimination and poverty. Are those who own property in biomedical research, hybrid residential associations, or cyberspace burdened by anything so significant as the combined forces of poverty and race discrimination? If a particular ownership structure alone can lead to the extinction of a whole group of property owners, what historical examples can be offered to demonstrate this point? For example, have middle class whites who have owned rural land under the tenancy in common form of ownership lost considerable amounts of their land at partition sales? Though little to no scholarship exists on this topic, empirical research might be able to answer this question. In any event, accepting for the sake of argument the claims Heller and Dagan make about black rural landowners, evidence of significant middle class, white land loss would provide a much better indicator of the perils that “property future” may in fact face, at least with respect to most of the examples of “property future” highlighted in their article.

natural much of the dispossession that has already occurred.<sup>60</sup> Further, such perspectives imply that ongoing efforts to use the law to secure more stable patterns of black landownership will prove futile. The normalization process generates little legal scholarship because: (1) the black landowner is cast as a historic, if tragic, figure of the past; (2) race is viewed as playing little, if any, role in what are assumed to be either ordinary market or macroeconomic processes;<sup>61</sup> or (3) racism is assumed to be an all-powerful force that will inevitably dispossess African Americans of their property no matter what the legal regime.<sup>62</sup>

With respect to the first reason offered, trivializing the legal issues impacting black landowners as “a dusty topic, peopled with hardscrabble tales of property past,” incorrectly suggests that black landowners have irreversibly faded into history. In fact, as discussed below, there is a group of *current* black rural property owners who own millions of acres of property valued at several billion dollars.<sup>63</sup> The assumption that race does not play a substantial role in property transfers is open to empirical investigation. Finally, the pervasiveness and enduring nature of racism might suggest that more, not less, energy should be invested in crafting legal reforms designed to promote more stable patterns of black land ownership, although to be effective, such initiatives must be part of a more comprehensive advocacy strategy.

In contrast to some, I have much more faith in the ability of the law

60. Professor Cheryl Harris describes some ways in which the law naturalizes and legitimizes substantive inequality along race lines to the advantage of whites and to the disadvantage of people of color. She states:

The law masks what is chosen as natural; it obscures the consequences of social selection as inevitable. The result is that the distortions in social relations are immunized from truly effective intervention, because the existing inequities are obscured and rendered nearly invisible. The existing state of affairs is considered neutral and fair, however unequal and unjust it is in substance. Although the existing state of inequitable distribution is the product of institutionalized white supremacy and economic exploitation, it is seen by whites as part of the natural order of things that cannot legitimately be disturbed.

Harris, *supra* note 51, at 1777–78.

61. See *supra* note 26.

62. One who believes that racism will endure as an indomitable force for the foreseeable future does not by this belief alone endorse biological or racial determinism ideologies that posit that members of a particular race are in their very constitution inferior. However, the belief in the durability of racism over time, when coupled with arguments that claim it would be futile to challenge manifestations of such racism, in effect operates to maintain the status quo, a status quo that embeds racial and social inequality. See FREDRICKSON, *supra* note 5, at 315–17.

63. NAT'L AGRIC. STATISTICS SERV., U.S. DEP'T OF AGRIC., 1997 CENSUS OF AGRICULTURE: AGRICULTURAL ECONOMICS AND LAND OWNERSHIP SURVEY 249 tbl.70 (1999) [hereinafter 1999 AELOS] (showing that blacks owned 7,629,000 acres of land worth \$14,366,319,000), available at <http://www.nass.usda.gov/census/census97/aelos/aelos.htm>.

and legal scholars to play a meaningful, although perhaps not a leading, role in helping poor and minority communities secure their assets. There is a tradition of legal scholars whose scholarship has played a significant role in generating public attention and supplying needed critical legal analysis with respect to important social issues, many of which had not theretofore substantially captured the public's attention.<sup>64</sup> The issues impacting black rural property owners are not so intractable or exceptional that legal scholars should shy away from investing time in publishing useful scholarship that primarily focuses upon the specific issues facing today's black rural property owners, and that develops well-designed legal reforms and programmatic solutions that would render black property retention a more realistic goal.<sup>65</sup> Policymakers and courts will benefit greatly from such legal scholarship as they develop policies and render decisions that may significantly impact rural property owners of modest means whether these property owners are black or are members of other races.<sup>66</sup>

### III. THE DATA THAT EXISTS WITH RESPECT TO BLACK LAND OWNERSHIP IS LIMITED

Any scholar interested in conducting empirical research with respect to trends in black rural property ownership confronts significant limitations as it relates to the available data. Further, the problems with

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64. See, e.g., JAMES S. LIEBMAN ET AL., *A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995* (2000) (reporting the results of a study that used quantitative analysis on error rates in death penalty cases, revitalized debate on the death penalty that almost seemed deadlocked between groups with opposing ideological perspectives, generated significant mass media attention, and played an important role in influencing policymakers to make changes to the death penalty system in certain jurisdictions); Daniel M. Filler, *Silence and the Racial Dimension of Megan's Law*, 89 IOWA L. REV. 1535, 1565-66 & 1566 n.127 (2004) (noting that new laws and policy initiatives are often produced in response to public opinion that can, in turn, be influenced by the mass media and "even legal scholarship").

65. Some law schools and law professors have been working hard to create legal programs to serve black landowners and farmers on the ground. For example, the Southern University Law Center, in conjunction with the Southern University Agricultural Research and Extension Center and the United States Department of Agriculture's Risk Management Agency have formed a partnership to conduct community legal education programs throughout Louisiana targeting small, limited resource farmers and landowners, many of whom are black. Under this partnership, nearly thirty such legal workshops were conducted throughout Louisiana between October 1, 2003, and December 31, 2004.

66. In 2002, the Supreme Court of Vermont relied, in part, on Professor Phyllis Craig-Taylor's article on partition sales of black-owned rural property (discussed below) in affirming a trial court's order that refused to order a partition sale sought by one family member who owned a one-eighth interest in a one-acre parcel of property in which his brother owned a seven-eighths interest. See *Wilk v. Wilk*, 795 A.2d 1191, 1192, 1195-96 (Vt. 2002).

the available data are significantly greater for researchers interested in studying more specific aspects of black land loss, such as the leading causes of such land loss. The currently available data can present especially difficult challenges to law professors for reasons described later in this Article.<sup>67</sup> Nevertheless, the very fact that there are data problems presents great opportunities for scholars, including legal scholars, to build new data sets that would greatly accelerate the development of scholarly knowledge regarding black rural property ownership patterns. Such informed scholarship could, in turn, contribute to the development of much needed policies and legal reform measures.<sup>68</sup>

### A. *The Problems with the Available Data Sets*

Many of those who have written about black land loss have relied upon, whether consciously or unconsciously, agricultural census data that the federal government has collected since 1840.<sup>69</sup> Beginning in 1925, the government began conducting an agricultural census every five years, as opposed to its earlier practice of collecting such agricultural data every ten years.<sup>70</sup> The availability of agricultural census data that spans more than 160 years has been of critical importance to those interested in studying trends in agriculture, including trends in black rural property ownership.

However, it must be emphasized that the census has been used as a proxy to study black landownership because there is no central database that collects information on property owners in the United States.<sup>71</sup> Although the agricultural census collects an extraordinary amount of data with respect to active farmers and farm operations in the United

67. See *infra* text accompanying notes 86–89.

68. See Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 102 (2002).

69. See 2002 CENSUS OF AGRICULTURE, *supra* note 21, at vii (noting that the first agricultural census was conducted in 1840). I include myself in this group of authors who have relied upon the *Census of Agriculture* data in doing studies on black land loss. See Mitchell, *supra* note 7, *passim*; see also ONLY SIX MILLION ACRES, *supra* note 30, *passim*; U.S. COMM'N ON CIVIL RIGHTS, THE DECLINE OF BLACK FARMING IN AMERICA *passim* (1982); C. Scott Graber, *Heirs Property: The Problems and Possible Solutions*, 12 CLEARINGHOUSE REV. 273, 275 & n.13 (1978); Chris Kelley, *Stemming the Loss of Black Owned Farmland Through Partition Action—A Partial Solution*, 1985 ARK. L. NOTES 35, 36 & n.7; Harold A. McDougall, *Black Landowners Beware: A Proposal for Statutory Reform*, 9 N.Y.U. REV. L. & SOC. CHANGE 127, 127 & n.2 (1979–1980); Leo McGee & Robert Boone, *Black Rural Land Ownership: A Matter of Economic Survival*, 8 REV. BLACK POL. ECON. 62, 64 (1977).

70. STATISTICAL HISTORY OF THE UNITED STATES, *supra* note 17, at 257.

71. James S. Fisher, *Rural Ownership of Land by Blacks in Georgia: 1920 and 1960*, 9 REV. BLACK POL. ECON. 95, 95 (1978).

States, the census is a much poorer source of information on rural landowners generally, although this is admittedly not its purpose.<sup>72</sup> This is the case because the agricultural census does not include data on nonproducing farmland owners who rent their farmland, or on owners who use their fertile land for nonfarming purposes.<sup>73</sup>

Within the past several years, the USDA has begun to collect more comprehensive data on agricultural landowners. In 1988, the National Agricultural Statistics Service (“NASS”) of the USDA—in a follow-up study to the *1987 Census of Agriculture*—collected more complete agricultural landownership data than the government had previously collected.<sup>74</sup> The results were published in the USDA’s first *Agricultural Economics and Land Ownership Survey* (“AELOS”) in 1988.<sup>75</sup> Because the AELOS includes data for those owners who actively operated farms and data on those who owned agricultural land that was farmed by someone else,<sup>76</sup> it provides a much more complete picture of agricultural landownership than the *Census of Agriculture*.

The difference in the numbers of black-owned acres of agricultural land reported by the *1997 Census of Agriculture* and the 1999 AELOS is dramatic. Whereas the *1997 Census of Agriculture* reported that 16,560 black farmers owned 1,499,083 acres of farmland,<sup>77</sup> the 1999 AELOS reported that 68,056 black agricultural landowners owned 7,629,000 acres of farmland.<sup>78</sup> A significant amount of the difference between the studies with respect to the reported number of acres of black-owned agricultural land is attributable to the fact that the 1999 AELOS reported that 38,815 black nonoperator agricultural landowners—owners who were not engaged in either farming or ranching themselves—owned 5,252,000 acres of land that they rented, leased, or allowed other farmers or ranchers to use rent free.<sup>79</sup> The 1999 AELOS valued the agricultural property of black farmland owners at nearly \$14.4 billion.<sup>80</sup>

72. 2002 CENSUS OF AGRICULTURE, *supra* note 21, at vii–viii (providing an overview of the agricultural census, and describing its history, purposes, and uses).

73. Jess Gilbert et al., *Who Owns the Land?: Agricultural Land Ownership by Race/Ethnicity*, 17 RURAL AM. 55, 58 (2002).

74. *See* 1999 AELOS, *supra* note 63, at introduction.

75. *See id.*

76. *See id.*

77. 1997 CENSUS OF AGRICULTURE, *supra* note 21, at 25 tbl.17.

78. 1999 AELOS, *supra* note 63, at 249 tbl.70.

79. *Id.*

80. *See id.* Specifically, the 1999 *Agricultural Economics and Land Ownership Survey* (“AELOS”) indicated that black farmland owners who were active farmers or nonoperator landlords owned property valued at \$14,366,319,000. *Id.* Without question, the number of black farmland owners, the acres these farmers own, and the value of their farm properties pale in comparison to the figures that the 1999 AELOS reports for white farmers: 3,218,751 white farmers; 815,443,000 acres of white-owned farmland; and white-owned farm properties valued at \$1,156,977,076,000. *Id.* In sum,

The number of acres of black-owned agricultural land, and the corresponding dollar value of this land, casts a significantly different light upon the condition of black farmland owners. Although the trend in black rural property ownership is troubling, even taking into consideration the more robust 1999 AELOS data,<sup>81</sup> such data make it clear that black rural property owners as a group are not merely some dusty vestige of the past.

Even the additional black rural landowners captured in the 1999 AELOS provide an incomplete picture of black rural landowners as a group given the fact that it did not collect data on rural landowners whose land is not being used by any farm operator (whether an owner-operator or a renter), even if such rural landowners actively utilize their property for nonfarming or nonranching purposes. My personal experiences have strongly suggested to me that many more acres of black-owned rural property exist than have been reported. After I testified on black land loss before members of the U.S. House of Representatives on February 5, 2002<sup>82</sup> and after I was quoted in the AP series mentioned earlier,<sup>83</sup> a number of black rural property owners

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the percentage of black farmland owners, as compared to white farmland owners, stands at about 2%; the percentage of black-owned land, as compared to white-owned land, is about 1%; and the value of black-owned farmland properties, as compared to white-owned farmland, properties is about 1.2%. *See id.*

Although these comparisons demonstrate the disadvantaged status of black farmland owners, the value of black-owned rural property as a whole—even larger than the value indicated in the 1999 AELOS given the fact that it did not collect data on rural landholdings that are not actively farmed—is not an insignificant asset within the African American community. This finding suggests that many African American rural landowners are likely to use every tool at their disposal to fight to retain their “present property” that is valued at several billion dollars. *See supra* note 63 and accompanying text.

81. Comparing the 1999 AELOS to the 1997 *Census of Agriculture* with respect to the number of acres of white-owned agricultural land does not appear to be possible given that the 1997 *Census of Agriculture* does not appear to provide a figure for the number of acres that white farm operators owned. The 1999 AELOS does capture significantly more acres of white-owned agricultural land than is reported in the 2002 *Census of Agriculture*. Compare 2002 CENSUS OF AGRICULTURE, *supra* note 21, at 48 tbl.47 (showing 534,480,132 acres of white-owned farmland), with 1999 AELOS, *supra* note 63, at 249 tbl.70 (showing 815,443,000 acres of white-owned farmland). As indicated previously, the 2002 *Census of Agriculture* reports that there were 2,196,264 acres of black-owned farmland. *See* 2002 CENSUS OF AGRICULTURE, *supra* note 21, at 48 tbl.47. Therefore, the percentage of black-owned agricultural land to white-owned agricultural land as reported in the 1999 AELOS (1.2%) does differ by nearly one percentage point from the comparable percentage one can glean from the 2002 *Census of Agriculture* (0.4%).

82. U.S. House Of Representatives, U.S. Representative John Conyers, Jr., Congressional Black Caucus, Town Hall Meeting: Black Land Loss (Feb. 5, 2002), available at <http://www.house.gov/conyers/trans020502.htm>.

83. *See, e.g.,* Lewan & Barclay, *supra* note 29, at 8A; Lewan & Barclay, *supra* note 37, at 8A; Todd Lewan & Dolores Barclay, *Torn from the Land: Black*

across the country contacted me with their concerns about property they owned that was sitting idle. Further, at the field site for my Ford Foundation sponsored research project on black land loss in rural North Carolina, I have also observed that there are a number of acres of black-owned land that are now lying idle. There are many reasons for this including, for example, that the owners are undercapitalized.

Moreover, although the AELOS is a better source with respect to studying trends in agricultural landownership, the study has a number of limitations. First, as a cross-sectional source that has been published only twice—in 1988 and 1999<sup>84</sup>—the AELOS represents a much more limited tool for those who want to analyze agricultural landownership trends over time. Second, the AELOS contains only national level, aggregate data with respect to racial and ethnic agricultural landownership characteristics; it does not provide such data at the state and county level.<sup>85</sup> These characteristics of the AELOS make it difficult to research more specific issues with respect to black rural property ownership.

### B. Challenges for Law Professors Conducting Traditional Legal Research

The challenges presented by the extant data sets described above can be especially difficult for law professors who might be interested in conducting research on black landownership issues. Although a small percentage of law professors utilize data sets of the kind utilized by those in the social sciences, either in solely authored work or in work done in collaboration with those with social science training,<sup>86</sup> the data sets most law professors rely upon for the cornerstone of their research consist of state and federal cases that are either published in legal reporters or are available electronically. There are few reported cases that clearly address involuntary black land loss issues, however, which leaves little grist for the typical law professor's research mill.<sup>87</sup> For

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*Families Lose Land Through Legal Maneuvering* (pt. 3), OAKLAND TRIB., Dec. 9, 2001, at A1.

84. See Gilbert et al., *supra* note 73, at 61.

85. *Id.*

86. In contrast to scholars in other disciplines, law professors undertake collaborative research at a much lower rate. See Epstein & King, *supra* note 68, at 47-48.

87. See, e.g., *McNeely v. Bone*, 698 S.W.2d 512, 513 (Ark. 1985) (confirming a partition sale of 160 acres of black-owned land); *Bousquet v. Brown*, 119 So. 166, 168 (Miss. 1928) (holding that an elderly African American property owner had properly redeemed his property that had been sold at a tax sale); *Young v. Krell*, 144 S.E. 512, 512-13 (S.C. 1928) (rejeeting an African American plaintiff's claim that the person who purchased his land at a foreclosure sale acquired a deed that was in fact intended as a mortgage to secure repayment of the \$425 foreclosure sales price plus



example, the research for my previous article on partition sales uncovered only one reported case that unambiguously featured a partition action resulting in the sale of black-owned rural property.<sup>88</sup> Given the dearth of readily accessible case law, there are limited opportunities for those who might be interested in conducting doctrinal research focusing exclusively on the topic of black land loss using traditional legal research methods to the exclusion of other methods; however, there are rich opportunities for those inclined to use more bottom-up research methodologies and those inclined to use some of the methodological research strategies employed by those who engage in “Law and Society” research.<sup>89</sup>

In fact, I did not fully appreciate that a number of African American rural property owners experienced problems with the tenancy in common form of ownership until I began working on a number of initiatives with the Land Tenure Center at the University of Wisconsin-Madison.<sup>90</sup> Through this work, I traveled to the South to meet with several organizations and public interest law firms that work on behalf of black farmers and landowners. Each of these organizations informed me that the tenancy in common form of ownership often disadvantages black rural landowners who seek both to maintain ownership of their property and to utilize their property productively. Some of these organizations have kept numerous files on individual black rural property owners who were experiencing legal problems of one sort or another as it related to their property ownership. On a trip a few years ago to the offices of the Federation of Southern Cooperatives in Epes,

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interest under a separate loan agreement between the parties); *cf.* *Eaton v. Humphreys*, 190 S.W.2d 973, 973–75 (Ark. 1945) (rejecting the claim of an African American heir property owner that his one-twentieth interest in 40 acres of land had been fraudulently obtained prior to the partition sale by the successful bidder at the partition sale).

Of course, many other reported cases may, in fact, exist that involve forced sales of African American-owned land; however, these cases are beyond the reach of researchers for all practical purposes. The problem for those interested in researching these matters is that the existing case law only rarely mentions the race of the property owners, at least with respect to cases reported in the last 100 years.

88. See *McNeely*, 698 S.W.2d at 513. In this case, the black heir property owners claimed that the Arkansas partition statute was unconstitutional as applied to them in contravention of the Fifth and Fourteenth Amendments to the U.S. Constitution. *Id.*

89. Delimiting the range of quantitative and qualitative methodological research methods employed by “Law and Society” scholars is imprudent given that academics who produce such scholarship are drawn from a number of disciplines including political science, anthropology, history, economics, sociology, psychology and law. *Introduction to LAW AND SOCIETY: READINGS ON THE SOCIAL STUDY OF LAW 13* (Stewart Macaulay et al. eds., 1995). The scholarship includes large-n quantitative studies, longitudinal studies, historical analyses, and in-depth ethnographic studies.

90. Univ. of Wis.-Madison, Land Tenure Center, at <http://www.ies.wisc.edu/ltc/> (last visited May 17, 2005).

Alabama—a very poor rural city with a population of little more than 200 people in Sumter County<sup>91</sup>—I noticed a deluge of individual case files that barricaded the desk of the office’s program director.<sup>92</sup>

#### IV. ACADEMICS AND ADVOCATES HAVE MADE CLAIMS WITH RESPECT TO BLACK LAND LOSS IN AN EMPIRICAL VACUUM

As mentioned, few scholars have conducted any empirical research projects that address rural property ownership issues within the African American community.<sup>93</sup> In this Part, I will first highlight that some academics and activists have made a number of unsubstantiated claims with respect to the legal phenomenon implicated in black land loss matters. Next, I will use the example of partition sales of heir property as an illustration of some of the types of unverified claims that have been made about black land loss. Then, I will suggest why these claims can be problematic both for academics and for activists who advocate on behalf of black rural property owners.

##### A. *Unsupported Claims Made by Academics and Activists*

Despite the lack of much relevant case law or empirical research on black land loss, some academics, activists, and others have spoken in a surprisingly authoritative tone on the topic. Claims have been made or recycled on a number of issues; many of these claims cannot be verified, as they either rely upon personal opinion alone, or are based solely upon untested theories. Some of these unverified claims address the reasons black landowners have (or are viewed as having) low will-making rates,<sup>94</sup> the degree to which certain legal processes are used by those

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91. See City-Data.com, Epes, Alabama, at <http://www.city-data.com/city/Epes-Alabama.html> (last visited May 17, 2005).

92. See *supra* notes 9, 38 and accompanying text.

93. See discussion *supra* Part III.A; see also text accompanying *supra* notes 7–11.

94. Some researchers have appeared to assume that the will-making rate among black landowners is particularly low. For example, one commentator stated that “[l]imited resources and a legitimate distrust of the legal system provided the rationale for many [African American] families to allow the intergenerational transfer of property to proceed through intestate succession.” Phylliss Craig-Taylor, *Through a Colored Looking Glass: A View of Judicial Partition, Family Land Loss, and Rule Setting*, 78 WASH. U. L.Q. 737, 776 (2000). Given the fact that the overwhelming majority of those with limited incomes and wealth tend not to make wills irrespective of their race, it is an open question whether the will-making rate for black landowners (a group that includes many people of limited income and wealth) is significantly lower than the will-making rates for other landowners of comparable means. See Mitchell, *supra* note 7, at 519.

Convinced that the will-making rate for black landowners is exceptionally low, despite the lack of any study that compares will-making rates for black landowners with will-making rates for similarly situated white landowners, *id.*, some of those who have

who acquire black-owned land through forced sales,<sup>95</sup> and the competitive conditions under which public auctions are conducted when black-owned rural property is sold under court order.<sup>96</sup>

Making or recycling such unsupported claims without adequate qualification adds little to our understanding of these issues. Instead of opportunistically using the limited number of empirical studies on black land loss, studies that were not produced by legal scholars and most of which are also now out of date, legal scholars could design new empirical research projects of their own. Although such new studies could make an important contribution by merely updating older empirical studies with more current data sets, they could also be designed in such a way to answer important theoretical legal questions that have not been tested or evaluated thus far. By framing the research questions through legal lenses not yet employed,<sup>97</sup> such studies could substantially build upon the type of studies generated by nonlegal scholars, legal practitioners, and activists.<sup>98</sup>

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written on the topic have set forth explanations for the purported low will-making rate. Some have claimed that black landowners have not made wills because they distrust the legal system in general. EMERGENCY LAND FUND, *supra* note 30, at 115 ("Estate planning through testacy was not incorporated into black thought because blacks felt that they could not trust or rely on a legal system which had traditionally failed to protect their interests."); Craig-Taylor, *supra*, at 776. Others have claimed that black landowners are "superstitio[us] about making wills." Dagan & Heller, *supra* note 26, at 606 (quoting Brooks, *supra* note 15, at 121). Although these are interesting theories, these claims lack any empirical basis.

95. See *infra* notes 111, 162-63.

96. Cf. Candace Reid, Note, *Partitions in Kind: A Preference Without Favor*, 7 CARDOZO L. REV. 855, 878-79 (1986) (discussing partition sales more generally).

[A] rule favoring sales in partition actions would promote efficiency by placing the property on the open market where co-owners opposing a sale or having a particular emotional attachment to the property would have an opportunity to retain possession by outbidding all comers. Therefore, the market price would reflect both the objective and subjective values of the property. . . . Under the principle of wealth maximization, when property is placed on the open market, courts are assured that the property will fetch the highest price possible and will end up in the hands of the party who values it the most.

*Id.*

97. For example, sociolegal scholars might be as interested in examining the phenomenon of the absence of reported case law on matters involving black land loss as they would be in evaluating the case law that currently exists.

98. Legal scholars might be able to improve upon some of the legal scholarship generated by scholars outside of legal academia, because sometimes nonlegal scholars have attempted to analyze legal processes in a manner that uses legal precedent somewhat clumsily or incompletely, thereby calling into question the results of such research. See, e.g., Thomas J. Miceli & C.F. Sirmans, *Partition of Real Estate; Or, Breaking Up Is (Not) Hard To Do*, 29 J. LEGAL STUD. 783, 784 (2000); see also *infra* text accompanying notes 140-48.

*B. The Weakly Supported Claims of Both Academics and Activists with Respect to Partition Sales of Heirs' Property Offer Little Guidance to Policymakers*

Tenancies in common in which at least some of the cotenants acquired their interest under state intestate succession laws are commonly referred to as heirs' (or heir) property. Heirs' property matters are significant for black rural property owners because the most comprehensive empirical study of heirs' property—conducted twenty-five years ago by the Emergency Land Fund—indicated that slightly more than 25% of black rural landowners owned heirs' property.<sup>99</sup>

The issue of partition sales of black-owned heirs' property was the subject of an earlier article of mine.<sup>100</sup> Without question, the very laws governing tenancies in common unjustly allocate rights and responsibilities between concurrent owners.<sup>101</sup> State laws typically permit a tenant in common, who owns only a tiny interest in the property, and who has contributed nothing to paying the ongoing costs of maintaining the property, to initiate a legal action that can result in the forced sale of the property against the wishes of the other interest holders.<sup>102</sup> In terms of personal liberty and autonomy, court-ordered partition sales can be troubling with respect to cotenants who oppose such sales, even in the absence of resultant negative wealth impacts.<sup>103</sup>

Although partition sales involving black-owned property raise a number of compelling legal and sociolegal issues, few legal scholars have made the issue the *central* focus of any of their scholarship.<sup>104</sup> Those outside of legal academia who have written directly on the topic include: nonprofit organizations (including nonprofits that specifically

99. EMERGENCY LAND FUND, *supra* note 30, at 62–63.

100. Mitchell, *supra* note 7.

101. *Id.* at 508.

102. *See id.* at 513–15 & 513 nn.38–40.

103. *See* Jules L. Coleman & Jody Kraus, *Rethinking the Theory of Legal Rights*, 95 YALE L.J. 1335, 1338–39 (1986) (“It is surely odd to claim that an individual’s right is protected when another individual is permitted to force a transfer at a price set by third parties. Isn’t the very idea of a forced transfer contrary to the autonomy or liberty thought constitutive of rights?”); Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719, 1772 (2004); *see also* Craig-Taylor, *supra* note 94, at 786 (“For many African Americans, property ownership and the retention of heir property are intrinsically connected to concepts of liberty and freedom.”); Epstein, *supra* note 11, at 2105–06; Laura S. Underkuffler, *On Property: An Essay*, 100 YALE L.J. 127, 143–44 (1990).

104. *See, e.g.*, Craig-Taylor, *supra* note 94; McDougall, *supra* note 69 Mitchell, *supra* note 7. Dagan and Heller merely use the topic of partition sales of black-owned land as background to address common property problems affecting other groups of property owners. *See supra* note 52 and accompanying text.

work on behalf of black landowners and black farmers),<sup>105</sup> a small number of academics in disciplines outside of legal academia,<sup>106</sup> a handful of legal practitioners,<sup>107</sup> and two law students.<sup>108</sup> Not only has little legal scholarship been written about partition sales of black-owned heirs' property, but little has been written about the legal conflicts that often crop up between cotenants of any race who own property under the tenancy in common form of ownership. According to one legal scholar, the class status of the typical cotenant helps account for the fact that few cotenant conflicts get litigated.<sup>109</sup>

Focusing upon partition sales of heirs' property is instructive, however, because certain scholars have made unqualified or very thinly supported claims about the nature of partition sales more generally—presumably including partition sales of black-owned land given that such statements have not been limited in any way—notwithstanding the fact that these claims lack much, if any, empirical support.<sup>110</sup> In addition to

105. EMERGENCY LAND FUND, *supra* note 30; HOUSING ASSISTANCE COUNCIL, LOSING GROUND: PUBLIC POLICY AND THE DISPLACEMENT OF RURAL BLACK-OWNED HOMESTEADS (1984); *cf.* Brooks, *supra* note 15.

106. *See, e.g.*, GLORIA B. TINUBU & JAMES C. HITE, INTTESTATE HOLDING OF RURAL LAND IN SOUTH CAROLINA: EMPIRICAL EVALUATION OF THE DIMENSIONS OF THE HEIRS PROPERTY PROBLEM (1978).

107. *See, e.g.*, Kelley, *supra* note 69. Although Professor Chris Kelley joined the faculty at the University of Arkansas–Fayetteville School of Law in 1998, he published his article on partition sales of black-owned property in 1985 when he was the senior staff attorney at Ozark Legal Services in Fayetteville, Arkansas. *See also* Graber, *supra* note 69.

108. Casagrande Jr., *supra* note 9; Hugo A. Pearce, III, Note, "Heirs' Property": *The Problem, Pitfalls, and Possible Solutions*, 25 S.C. L. REV. 151 (1973).

109. *See* Evelyn Alicia Lewis, *Struggling with Quicksand: The Ins and Outs of Cotenant Possession Value Liability and a Call for Default Rule Reform*, 1994 Wis. L. REV. 331, 341.

[C]otenant conflicts are for the most part hidden dramas in the world of real property conflicts. They are dramas which generally involve parties whom Professor Marc Galanter calls "oneshotters"—parties who rarely litigate, who are predominantly members of the obedient middle-class and who suffer quietly the rules of law they were too unsophisticated to know or consider in advance of the conflict. For these and other reasons, cotenant conflicts receive little attention from property law reformers, and the default rules applicable to in/out-tenant conflicts reflect this inattention.

*Id.* (footnote omitted).

110. Most articles that address the relative merits of the partition in kind versus partition sale assume that the trade-off is between privileging a regime that reifies the principle of wealth maximization by only weighing competing objectively determined economic values, and a regime that seeks to uphold subjective, noneconomic values as well. *See, e.g.*, Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531, 601 (2005); Craig-Taylor, *supra* note 94, at 771; Miceli & Sirmans, *supra* note 98, at 784. Some articles appear more confident that under a partition sale, a person who values the property above its objective value can become the highest bidder, which will result in a sales price that reflects both subjective and

“top-down” legal scholarship and commentary on partition sales, which has failed to subject theories to empirical scrutiny, certain activists have made claims about partition sales of black-owned property that are hard to evaluate given the lack of empirical support for these claims.<sup>111</sup>

#### 1. UNSUPPORTED CONCLUSIONS DRAWN BY ACADEMICS MUST BE TESTED EMPIRICALLY

To date, there has only been one substantial study conducted that explores the heirs' property problem within black communities in the South.<sup>112</sup> This study was conducted by a nonprofit advocacy group called the Emergency Land Fund that has now been folded into a group founded during the Civil Rights Movement called the Federation of Southern Cooperatives.<sup>113</sup> Although the study provides empirical information on a number of issues pertaining to heirs' property in the southeastern region of the United States, the study does not address many other important research questions. For example, the study does not seek to either estimate or quantify in any way the degree to which partition sales contribute to black land loss, or address whether there are negative wealth impacts that flow from partition sales.

Overall, the limited amount of scholarship addressing the topic of partition sales—partition sales of black-owned heirs' property or partition sales more generally—has drawn upon little, if any, empirical

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objective values. See, e.g., Bell & Parchomovsky, *supra*; Reid, *supra* note 96, at 878–79. Others appear to be more skeptical that noneconomic values can be upheld under partition sales:

The economic valuation process reflects a hierarchy where market activity is implicitly privileged, and psychological and emotional components are undervalued. Partition sales of family owned property have the potential not just to reinforce this hierarchy, but to capitalize on it. The values of co-owners who do not share these assumptions about value are marginalized. Their claims are deemed less worthy due to their failure to communicate their value in financial terms.

Craig-Taylor, *supra* note 94, at 769; see also Gillian K. Bearns, Note, *Real Property—Giulietti v. Giulietti—Partition by Private Sale Absent Specific Statutory Authority*, 26 W. NEW ENG. L. REV. 125, 157 (2004).

111. Cf. Edward J. Pennick, *Land Ownership and Black Economic Development*, 21 BLACK SCHOLAR 43, 44 (1990) (claiming that “[n]ext to voluntary sales, the lack of a will is the primary cause of black land loss”). Pennick’s statement is based upon the belief that intergenerational transfers of property interests in land through intestacy results in a greater number of cotenants than would be the case if a will were made. Given that it only takes one cotenant to initiate a partition sale, the more cotenants there are in any particular case, the more likely it is that a partition sale might be initiated. See Graber, *supra* note 69, at 277 (“One thousand heirs provide 1,000 targets to a person who really wants the land.”).

112. EMERGENCY LAND FUND, *supra* note 30.

113. The organization is now called the Federation of Southern Cooperatives/Land Assistance Fund.

support. Those who believe that heir property owners should have greater property rule protections vis-à-vis their cotenants, as opposed to liability rule protection,<sup>114</sup> base their argument on the normative claim that property rights should be protected because property ownership in our society is viewed as supporting both economic and noneconomic values.<sup>115</sup> With few exceptions, these articles do not seek to tease out in much detail or provide much empirical support for the noneconomic values that such property ownership purportedly supports. Further, these articles do not address whether such court-ordered partition sales may be economically efficient because such analysis would not strongly influence their normative judgments.

In contrast to those who believe that courts should do more to uphold the interests of cotenants who would like to retain ownership of their property interests—in accordance with the statutory schemes of most state statutes that address whether a partition in kind or a partition sale is favored<sup>116</sup>—other scholars have argued that courts have properly altered the statutory presumption to favor the partition sale order over orders to partition land in kind. In developing their “value theory” of property under which “only assets for which protection of stable ownership will enhance social welfare” receive property rule protection,<sup>117</sup> Professors Abraham Bell and Gideon Parchomovsky state:

In view of the value theory, the courts have reached precisely the right result. Questions of practicality in the ordinary test for partition in kind match the issue of ideal asset size noted above. As the value theory would suggest, the courts determine the question of asset size and forced sale by reference to value, rather than to property abstractions like Honore’s incidents. Moreover, even where partition by sale is favored, co-tenants may bid for the sold property; thus, partition by sale allows a co-tenant who has developed enough of a subjective attachment to . . . become the highest value

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114. See Miceli & Sirmans, *supra* note 98, at 784 (noting that, with respect to court-ordered partition sales, “each owner’s share is protected by a liability rule rather than a property rule vis-à-vis the owners”).

115. Kelley, *supra* note 69, at 35–36; see also Craig-Taylor, *supra* note 94, at 760–68 (claiming that, in addition to supporting liberty interests, property ownership for African Americans may satisfy the “need for refuge, solace, and self-determination in a persistently discriminatory social landscape”).

116. Mitchell, *supra* note 7, at 513 n.40 (citing numerous state statutes that prefer partition in kind as a remedy in a partition action, but only one state statute that does not prefer such a remedy, and listing many state statutes that express no clear remedial preference).

117. Bell & Parchomovsky, *supra* note 110, at 563.

user to take control of the property by submitting the appropriate bid.<sup>118</sup>

Essentially, Bell and Parchomovsky argue that when the ownership shares become too fragmented, subjective values held by any cotenants must give way to values of economic efficiency that are vindicated under a partition sale.<sup>119</sup>

Their analysis is deficient in three ways. First, their article earlier acknowledges that courts have conflated the traditional two-part partition test by making economic efficiency values alone decisive.<sup>120</sup> Second, their conclusion that courts have reached “precisely the right result” under their value theory begs the following question. In those cases in which courts order partition sales, is it always the case that the land could not have been divided in such a way that each of the subdivided parcels would meet the threshold “ideal asset size” test? Given that the authors do not analyze the facts of a *single* partition case their statement is highly suspect.<sup>121</sup> Third, their intimation that partition sales are unproblematic because cotenants who have developed substantial subjective attachments to the property in question may become the

118. *Id.* at 601.

119. *Id.* at 564.

Whether the asset is divided physically, or whether its ownership is divided among many owners, the solution is clear: either recombine the microparcel, or reaggregate the microshares of ownership. Either way, the legal system should discourage stability in ownership until the asset is significant enough that there is value in its stable ownership.

*Id.* With respect to tenancies in common, Bell and Parchomovsky do not consider that there might be ways of reworking the ownership structure short of complete liquidation that will enable the cotenants to use their property more effectively. See Mitchell, *supra* note 7, at 572–75.

120. Bell & Parchomovsky, *supra* note 110, at 601.

121. Bell and Parchomovsky offer no guidance or metric that would help one analyze when an asset meets or fails the “ideal asset size” test. Obviously, such a test must be flexible enough to account for the fundamentally different contexts in which it would be applied. For example, evaluating the appropriateness of ordering a partition sale under the “ideal asset size” test with respect to a 1500 square foot condominium unit owned by four family members under a tenancy in common must be somewhat different from evaluating the appropriateness of ordering a partition sale of a 160-acre property owned by four tenants in common. The condominium hypothetical would be much more amenable to a *per se* rule: ordering a partition in kind would be *per se* inequitable or impracticable. However, just because courts may routinely order partition sales with respect to rural property does not necessarily mean that the court-ordered partition sale accords with the “ideal asset size” test. See, e.g., *McNeely*, 698 S.W.2d at 513–14 (denying the request of owners of a 28.6% interest in 160 acres owned under a tenancy in common who were willing to accept a forty-acre tract that represented just 25% of the property in question). Did the Arkansas court that ordered a partition sale in *McNeely* do so in a manner consistent with the “ideal asset size” test? Without a better articulation of the ideal asset size test, this question cannot be answered.



highest bidder risks elevating form over substance. The statement is unsupported by any analysis that would give the reader confidence that cotenants who have developed substantial subjective attachments to property do in fact become the highest bidders in a nontrivial number of partition sale cases.<sup>122</sup> Having substantial subjective attachment to any given parcel of property does not enable one to purchase the property at an auction; such purchases require sufficient cash, credit, or other forms of financing.<sup>123</sup>

Moreover, most law professors who have written on the subject of partition sales have appeared to assume that real property sold at a partition sale is normally sold under competitive, free market conditions.<sup>124</sup> These legal scholars have not sought to test this assumption despite the fact that such knowledge is crucial to determining whether the sales price fetched by a partition sale can be described as reflecting objective values or not. For those scholars who believe that tipping the balance to favor partition sales is appropriate, the assumption that such sales are conducted under competitive conditions elides any of the tough distributive choices that would have to be made if empirical studies were to reveal that many incumbent property owners lose substantial financial assets as a result of partition sales conducted under less than competitive conditions. Such assumptions also ignore some empirical evidence on auctions that suggests that property sold at auctions tends to be sold at a discount as compared to property sold

122. For any number of reasons, those holding substantial subjective interests in property owned under a tenancy in common may not be in a financial position to compete effectively at a court-ordered partition sale. See, e.g., *Wilk*, 795 A.2d at 1195-96 ("It is not hard to imagine siblings who, although they may have limited resources which enable them to buy out a co-tenant's share in the family farm, could not outbid a developer if forced to put the property up for public auction.")

123. Therefore, the monetary offers made at an auction cannot serve as a proxy for measuring the degree to which the bidders subjectively value the asset that is up for sale. Subjective valuations aside, it is questionable whether the person who does become the highest bidder at an auction may be deemed to be the person who valued the property the most given the possible differential wealth endowments of the various bidders. Craig-Taylor, *supra* note 94, at 770-71.

124. *But see* Dagan & Heller, *supra* note 26, at 607.

Partition sales, like foreclosure and tax sales, prove to be poor, often rigged markets with little information and few buyers: "[T]he purchaser[s] at these [partition and] tax sales are almost always white persons, frequently local lawyers or relatives of the local officials, who make it their business to keep abreast of what properties are going to auction and who attend the auctions prepared to buy." Given wealth disparities, widespread discrimination in access to credit for rural black households, and the ordinary imperfections of these rural auctions, partition sales in practice mean the transfer of the land from resident black heirs with fractional interests to white purchasers who often pay below market value and pay nothing for the farm's intangible value in preserving family cohesion.

*Id.* (alterations in original) (footnote omitted).

under a negotiated, voluntary sale.<sup>125</sup> In this vein, many minority landowners have claimed that auctions under which their property is forcibly sold are often conducted in shady ways that result in their land being sold to certain connected individuals for a fraction of its real value.<sup>126</sup>

With respect to partition sales of black-owned heirs' property, one legal scholar has vigorously indicated to me that courts should be more aggressive in ordering partition sales of black-owned heirs' property. He has not made this argument in any published work. Instead, he did so during the course of an interview I had when I was first seeking employment as a law professor in 1998. At the very beginning of this particular interview, this law professor—the dean of a law school that I will leave unnamed—brusquely took almost complete control of the questioning. He flatly indicated that my written submission on the subject of partition sales of black-owned heirs' property was fundamentally flawed because I had misidentified as problematic some of the characteristics of court-ordered partition sales of black-owned rural property. As opposed to my stated view that in rendering decisions in partition actions, courts should give greater consideration to the preferences of black heir property owners who would like to maintain ownership of their property, whether for economic or noneconomic reasons, this dean indicated that partition sales should be ordered with even greater frequency on economic efficiency grounds alone. To paraphrase his argument, he claimed:

Black heir property owners are at best subsistence farmers who are not able to use their property productively. Forcing the sale of their property at public auctions enables wealthy individuals or corporations to purchase this property—at full market value I assume. Once these individuals or corporations purchase this property, of course, they make financial investments that assure that the property is used for its highest and best use. For example, they often build factories on what had formerly been underutilized agricultural property when held by the black heir property owners. The former black heir property owners then benefit because they are then employed in manufacturing jobs that pay far more money than the former heir property owners earned operating their subsistence farms.

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125. See Christopher J. Mayer, *Assessing the Performance of Real Estate Auctions*, 26 REAL ESTATE ECON. 41, 61 (1998) (finding "that auctions in Los Angeles during the real estate boom of the mid 1980s sold property at a discount that ranged between 0% and 9%, while similar sales in Dallas during the real estate bust of the late 1980s produced discounts between 9% and 21%").

126. See CIVIL RIGHTS ACTION TEAM, *supra* note 20, at 15–16.

Obviously, this dean's Law and Economics analysis of partition sales of black-owned heirs' property completely discounts any noneconomic value that property ownership may provide to black rural property owners. An analysis that ignores the special importance that landownership has had within the African American community would appear unnatural or unsatisfying to many.<sup>127</sup> Limiting the analysis to his own purely economic terms, this dean's hypothetical transaction paints a picture of a transaction in which no one is left worse off economically than they were before the transaction, and in which the former black heir property owners come out ahead when their hypothetical new manufacturing jobs are taken into account. Therefore, the transaction is not just economically efficient under a Kaldor-Hicks model of economic efficiency, which privileges wealth maximization in the aggregate even though it allows for economic winners and losers;<sup>128</sup> it would even satisfy the more stringent requirements of the Pareto superior model of efficiency, under which at least one of the parties is made economically better off from a transaction under which no one is made worse off.<sup>129</sup>

In terms of the economic efficiency claims, the most glaring problem with the conclusions drawn by this dean is that his analysis is based upon a theory that is utterly removed from any empirical support, and includes a number of assumptions that appear to be unreasonable.<sup>130</sup>

127. See Mitchell, *supra* note 7, at 523-26; see also Lester M. Salamon, *The Time Dimension in Policy Evaluation: The Case of the New Deal Land-Reform Experiments*, 27 PUB. POL'Y 129, 151-52 (1979). With respect to New Deal farm communities discussed further on in this article, claiming that

at least for Southern blacks, the acquisition of land meant something far more than mere economic viability: it meant independence, security, the opportunity to develop pride in ownership and to enjoy a measure of control over one's destiny—in a word, escape from the debilitating dependency and degradation of the sharecrop system and the opportunity to become "self-reliant individuals."

Salamon, *supra*, at 151-52.

128. See Lynne L. Dallas, *Law and Socioeconomics in Legal Education*, 55 RUTGERS L. REV. 855, 884 (2003).

129. JoEllen Lind, *The End of Trial on Damages? Intangible Losses and Comparability Review*, 51 BUFF. L. REV. 251, 317 (2003).

130. This has been a central critique of much Law and Economics scholarship. See, e.g., Michelle J. White, *The Economics of Accidents*, 86 MICH. L. REV. 1217, 1225-26 (1988) (reviewing STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* (1987)).

An ever-present problem in applying economic models to legal questions is that in order to construct economic models, we must make simplifying assumptions. While these may enable us to reach clear, simple answers which are very intuitively appealing, the answers that economic models give us are only as good as their assumptions. Thus, we must always approach these answers skeptically, particularly if we plan to use them as arguments for possible changes in the law or in related institutions.

For example, given a history of labor market discrimination in this country and the declining number of manufacturing jobs in our economy, the assumptions that factories will be built on land forcibly acquired from black property owners and that black people will experience no employment discrimination in these rural communities seem unrealistic, to put it mildly. The hypothetical raises many more questions than it answers, including many economic ones. These questions include, but are not limited to, the following:

1. Of the group of black rural heir property owners whose property is forcibly sold at partition sales, were most unable to use their property productively when they were owners?
2. Are the public auctions at which property is sold conducted under competitive conditions or are these auctions rigged in one way or another?
3. If the auctions yield full market value prices, are there court costs, attorneys' fees, or other transaction costs that the former heir property owners incur that will significantly reduce the amount of their distribution from the sale rendering them less than economically whole?
4. Do the individuals or corporations that purchase property at partition sales make investments in the property so that the property is used for its highest and best use, or do they hold it for long periods of time for speculation?
5. If the new property owners do utilize the land for its highest and best economic use, do such uses include building factories that create jobs?
6. If such factories are built, how many jobs do they generate?
7. If at least as many jobs are created as there were heir property owners, do the former heir property owners who seek employment in such factories obtain such employment, or is there labor market discrimination that locks them out of these opportunities?

The hypothetical exemplifies the approach taken by some "first-generation" Law and Economics scholars. These scholars often advocate that the law in any particular substantive area should be governed by an economic efficiency model, and often make many

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When the assumptions made are reasonable, then the answers will also be reasonable. But there has been so little empirical research in law and economics that we are often in the dark concerning which assumptions are reasonable and which are not.

questionable simplifying assumptions that fail to take into account specific institutional, political, racial, class, and other factors in order to demonstrate the superiority of the efficiency model.<sup>131</sup> Even many well-respected Law and Economics scholars have criticized their own field for relying too heavily upon theoretical models that are not tested empirically.<sup>132</sup> Echoing the sentiments of many others, Professor Frank B. Cross of the University of Texas School of Law has stated that “Law and Economics scholars have performed surprisingly little empirical work.”<sup>133</sup> In the area of property law, Richard Epstein—currently professor of law and director of the John M. Olin Program in Law and Economics at the University of Chicago Law School—has criticized Law and Economics scholarship that advocates relegating property owners to liability rule protection on efficiency grounds instead of providing such property owners with property rule protection with respect to their assets.<sup>134</sup>

131. *See id.*

132. *See, e.g.,* Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 319–20 (1997); William M. Landes, *The Empirical Side of Law & Economics*, 70 U. CHI. L. REV. 167, 176 (2003); Brett H. McDonnell, *The Economists’ New Arguments*, 88 MINN. L. REV. 86, 108–09 (2003).

133. Cross, *supra* note 132, at 319.

134. Professor Richard Epstein stated:

Stated formally, the task of a legal system is to minimize the sum of errors that arise from expropriation and undercompensation, where the two are inversely related. Stated empirically, the solution is that the risk of undercompensation is greater in the routine case, such that we are willing to put up with the endemic risks of a liability rule only in those cases in which we can envision major impediments to a system of property rules, and even then we hedge their operation with expensive institutional safeguards that are not needed when exchanges take place by mutual consent. As with all assertions of this sort, the claims here are implicitly empirical but not capable of precise justification. Yet the very strong set of practices in legal systems suggests that just this judgment has been made, perhaps unconsciously, by large numbers of persons who have been forced to confront just these choices.

This aspect of the subject is, however, usually missing in the law and economics approaches to the problem. Rather, the choice between property rules and liability rules is often decided at a very high level of theoretical abstraction, where insufficient attention is paid to the specific institutional context in which the one set of rules displaces the other. The models in question chiefly analyze some one-period, two-party situation, such as the pollution of a stream or the breach of a single contract, and then seek to derive very broad generalizations about the relative strength of the two types of rules, without asking how specific institutional contexts might influence the relevant choices. In so doing, the opportunity is lost to develop a more systematic view of the relative spheres of influence of these rules over the full range of social arrangements.

Epstein, *supra* note 11, at 2094–95 (footnotes omitted).

One published Law and Economics article that considers the economic consequences of partition sales gives greater consideration to values other than wealth maximization in evaluating the distributive fairness of ordering a partition sale, as opposed to a partition in kind that allows cotenants to retain ownership of divided parcels of the formerly undivided property.<sup>135</sup> That article—published by Professors Thomas J. Miceli and C.F. Sirmans—purports to develop an economic standard to guide a court's choice between ordering a partition in kind and ordering a partition sale.<sup>136</sup> Miceli and Sirmans indicate that their approach seeks to “adopt the objective of maximizing the aggregate value of the land (including subjective values).”<sup>137</sup> One of their hypothetical examples posits that one cotenant values his interest in the undivided property well above its market value because “maintaining an ancestral property intact may hold great sentimental value for this owner.”<sup>138</sup> Although traditional Law and Economics analysis would not recognize such subjective value as an important factor to be considered, Miceli and Sirmans state that a court “needs to account for the subjective values of nonconsenting owners” before deciding to order a partition sale.<sup>139</sup>

Their article, however, demonstrates that scholars, irrespective of their training, can draw upon case law in support of their theories in a manner that violates many rules of empiricism and inference.<sup>140</sup> After setting forth an economic model that the authors advocate that judges in partition actions should use as a guide—a model that requires judges to consider both objective valuation of the property and subjective values of the property owners<sup>141</sup>—the authors evaluate whether courts apply a model similar to the one they propose.<sup>142</sup> The authors conclude: “[o]ur review of the case law suggested that courts engage in a similar balancing test as embodied in the requirement that a sale will be ordered only in those cases where the resulting fragmentation would materially reduce the aggregate value of the land.”<sup>143</sup>

135. See Miceli & Sirmans, *supra* note 98, at 786, 792.

136. See *id.* at 796.

137. *Id.* at 788.

138. *Id.* at 786.

139. See *id.* at 792.

140. Other scholars as well have identified this as a problem endemic within many published works of legal scholarship, including published law and economics scholarship. See, e.g., Epstein & King, *supra* note 68, at 100–01 (claiming that legal scholars often use rather limited data to make unsubstantiated causal inferences with respect to ill-defined or nonspecified “target populations”); cf. Landes, *supra* note 132, at 169 (claiming that the Law and Economics articles in his sample are not empirical if the authors of these articles use legal cases, but do not tabulate these cases in any way).

141. Miceli & Sirmans, *supra* note 98, at 784–93.

142. *Id.* at 793–96.

143. *Id.* at 796.

The problem with the authors' conclusion is that the reader is not provided with sufficient information to evaluate the authors' claim about the case law. Although the authors would like the reader to assume that the seven selected cases<sup>144</sup> are representative of some (undefined) universe of reported partition cases, they offer the reader no guidance on how the cases were selected. Further, six of the seven reported cases that constitute their sample were decided between 1917 and 1954.<sup>145</sup> The seventh was decided in 1984.<sup>146</sup> This is troubling because, early on in their article, the authors indicate that the law in this area has been dynamic and changing.<sup>147</sup> In this earlier section, they state: "[C]ourts and legislatures have traditionally urged that forced sales be used only in exceptional circumstances. Actual practice, however, seems to be the reverse—forced sale is the norm and partition the exception."<sup>148</sup> Theoretically, the older cases in the authors' sample may be able to be harmonized with the purported earlier traditional rule that the authors themselves identify, although the authors do not indicate any time period in which the traditional rule was applied.

However, even this older, limited sample of cases is insufficient to demonstrate that under the traditional rule, as articulated by the authors, state court judges throughout the country ordered few partition sales, and only in the most exceptional cases.<sup>149</sup> The authors' even more ambitious attempt to draw a general inference from these out-of-date cases—that state court judges in all states in more recent times order

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144. See *id.* at 793–96 (discussing these cases).

145. *Id.* at 793–95 (citing *Williams v. Wells Fargo Bank & Union Trust Co.*, 133 P.2d 73 (Cal. Dist. Ct. App. 1943) (reversing a partition sale order because the defendant failed to prove that partition in kind would cause great prejudice to the common owners as a group, and that a under a partition sale, the land would be sold for a greater aggregate value than the aggregate value of the land if it was divided); *Murphy v. Bates*, 276 N.W. 29 (Iowa 1937) (affirming a partition sale order where the division of the land would diminish the aggregate value of the land); *Trowbridge v. Donner*, 40 N.W.2d 655 (Neb. 1950) (reversing a partition sale order because the defendant failed to prove that partition in kind would cause great prejudice to the common owners as a group, and that a under a partition sale the land would be sold for a greater aggregate value than the aggregate value of the land if it was divided); *Johnson v. Hendrickson*, 24 N.W.2d 914 (S.D. 1946) (affirming a partition sale where the aggregate value of land, if partitioned in kind, would be substantially less if the land were sold at a partition sale); *Williamson Inv. Co. v. Williamson*, 165 P. 385 (Wash. 1917) (affirming a partition in kind where the depreciation in the value of the land if divided in kind was slight in comparison to the aggregate value of the land in its undivided state); and *Marshall & Isley Bank v. DeWolf*, 268 Wis. 244, 67 N.W.2d 380 (1954) (reversing a partition sale where the evidence was insufficient to prove that a partition in kind would leave each cotenant with a piece of property materially less valuable than his share of the proceeds of a partition sale of the whole if such a sale had been ordered instead)).

146. *Id.* at 795–96 (citing *Schnell v. Schnell*, 346 N.W.2d 713 (N.D. 1984)).

147. *Miceli & Sirmans, supra* note 98, at 784.

148. *Id.*

149. *Id.* at 784, 795.

partition sales only if a partition in kind would materially reduce the aggregate value of the property<sup>150</sup>—lacks credibility given the sample of cases. Without knowing much more about the universe of other partition cases, the authors' rather unequivocal conclusions about the manner in which typical courts handle partition actions lacks empirical support and is unreliable.

The available reported case law on partition sales of black-owned property, and other data on partition sales of black-owned heirs' property, calls into question the conclusions that Miceli and Sirmans draw from their sample of cases. For example, in *McNeely v. Bone*,<sup>151</sup> the Supreme Court of Arkansas considered a partition case in which the black heirs who owned an undivided 28.6% interest in 160 acres of property attempted to fend off a partition sale requested by white speculators who had purchased the undivided interests of the other heirs.<sup>152</sup> The court stated:

The facts in this case may be close to the scenario addressed in the Arkansas Law Notes article, i.e., a white speculator buying black owned land for less than its value by using the partition device, but there is no evidence to show it. Even if there were, the cited article suggests legislative solutions which would permit persons desirous of holding on to ancestral land to fend off partition speculators. It does not suggest that § 34-1801 [of the Annotated Statutes of Arkansas allowing any owner to seek partition of the land] or the Arkansas partition statutes, generally, are unconstitutional.<sup>153</sup>

Ultimately, the Supreme Court of Arkansas affirmed the chancery court's order of a partition sale, although the black heirs stated that they were willing to accept a forty-acre tract that represented 25% of the land (even though they owned a 28.6% interest in the property).<sup>154</sup>

The cases that the AP writers uncovered cast further doubt upon Miceli and Sirmans's conclusions. In the case of the Beckett family from South Carolina, a white land speculator acquired a small undivided interest in a 335-acre tract that had been owned by the black family since 1873, and initiated a partition action.<sup>155</sup> The land speculator then effectively purchased 285 acres of the black-owned property for

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150. *Id.* at 796.

151. 698 S.W.2d 512.

152. *Id.* at 513.

153. *Id.*

154. *Id.* at 513–14.

155. Lewan & Barclay, *supra* note 29, at 8A; *see also supra* note 39.



\$161,223 at a partition sale.<sup>156</sup> She then subdivided the property and sold the various tracts for \$1,708,117.<sup>157</sup> Obviously, the Becketts were stripped of significant wealth in this transaction, and certainly were not adequately compensated based upon their subjective valuation of their property—property that certainly could be characterized as ancestral property.<sup>158</sup>

The Beckett case was one of fourteen cases the AP reported in its *Torn from the Land* investigative story.<sup>159</sup> The AP writers assessed the group of cases as follows:

Each case was different, each complicated, with some taking years to resolve. But, in nearly every case, land traders bought small shares of black family estates, sometimes from heirs who were elderly or mentally disabled, and then sought partition sales. All 14 estates were acquired from black families by whites or corporations, *usually at bargain prices*.<sup>160</sup>

The cases analyzed by the AP suggest that cotenants who prefer to maintain possession based upon their subjective values are rarely the successful bidders, and that the auctions are often rigged or otherwise conducted in a manner that yield below market, distress sale prices. More extensive empirical research would help legal scholars determine whether the fourteen cases analyzed by the AP serve the role of a miner's canary or whether the AP cases are simply dramatically heartrending, but ultimately unrepresentative.

Miceli and Sirmans's ineffective use of case law makes another point with respect to interdisciplinary legal research. Scholars trained in one discipline can sometimes work at a disadvantage when trying to cross disciplinary divides by working with data sets that are not typically used within their discipline.<sup>161</sup> Of course, this suggests that there are

156. Lewan & Barclay, *supra* note 29, at 8A (noting that the land speculator originally paid the Becketts \$146,000 for the land, but paid them more after a court ruled that her dealings with the Becketts were "unconscionable").

157. *Id.*

158. *See id.*

159. *Id.*

160. *Id.* (emphasis added). Of course, we cannot assume that the fourteen cases the AP writers selected are representative of all cases in which courts have ordered a partition sale of black-owned heirs' property. We would need to know much more about how the AP writers came to study these cases.

161. Just as Professors Thomas J. Miceli and C.F. Sirmans use case law ineffectively, legal scholars can sometimes have difficulty working with nonlegal data sets.

rich opportunities for collaborative research for those interested in studying the law from multiple perspectives.

2. ACTIVISTS WHO MAKE UNSUPPORTED CLAIMS MAY UNINTENTIONALLY LEAD POLICYMAKERS, ACADEMICS, AND OTHERS TO MISALLOCATE SCARCE RESOURCES

The Emergency Land Fund's 1980 report on heirs' property claimed that "[t]here is little, if any, dispute that a sale for partition and division is the most widely used legal method facilitating the loss of heir property."<sup>162</sup> In 1985, a leading advocate of black rural property retention estimated that half of the cases leading to black land loss at that time were the result of court-ordered partition sales.<sup>163</sup> It is nearly impossible to evaluate these claims, given that they are based solely upon general impression, anecdotes, or samplings of cases that one organization or another has received as part of their intake of black land loss cases. As I discuss in Part V, my research project in rural North Carolina has led me to question the degree to which partition sales have been a source of black land loss, at least with respect to involuntary black land loss in the past thirty to forty years.

For academics, conclusions drawn with insufficient empirical support can render the scholarship unreliable to other scholars, policymakers, and consumers of such scholarship. Although organizations and others who work to promote black land retention are often not well-positioned to conduct in-depth empirical studies on their own (mostly due to resource constraints and the "in the trenches" nature of their work, which often leaves little time for reflective analyses), unsubstantiated claims made by these organizations with respect to trends in black land ownership risk misdirecting the scarce public and private resources available to support black landowners specifically and black landownership more generally. This is particularly the case with respect to the issue of black land loss, given that those in a position to allocate such limited public and private resources must rely heavily on community-based organizations for guidance, because of the lack of many empirical studies produced by academics.

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162. EMERGENCY LAND FUND, *supra* note 30, at 273; *see also* Casagrande Jr., *supra* note 9, at 756 & n.9 (citing an interview with Edward Pennick of the Federation of Southern Cooperatives/Land Assistance Fund).

163. Casagrande Jr., *supra* note 9, at 756 n.9.

3. THE LACK OF SUFFICIENT EMPIRICAL STUDIES AND GOOD DATA PROVIDE AMPLE OPPORTUNITIES FOR LEGAL SCHOLARS TO MAKE CONTRIBUTIONS THAT WOULD BENEFIT SCHOLARS AND POLICYMAKERS

The lack of empirical studies and reported case law on partition sales provides legal scholars with an opportunity to make significant contributions to the development of knowledge in this area. Even research projects limited to amassing new data sets on partition sales would be invaluable, given that no scholar currently has (1) good data on the frequency with which partition sale actions are initiated in any given geographical area; (2) data on the races of the high bidders or involuntary sellers of property that is sold at partition sales; (3) data on the number of cotenants who unsuccessfully try to prevent a partition sale from being ordered who end up being the high bidders at court-ordered auctions; or (4) data with respect to the sales prices that individual properties that are sold at partition sales fetch.

What appear to be obstacles actually provide great sources of ideas for new research. For example, although it may be counterintuitive to some, legal and sociolegal scholars can generate a number of hypotheses to explain the very small number of reported cases that specifically address court-ordered partition sales of black-owned heirs' property.<sup>164</sup> These hypotheses—two of which I will now discuss—can be evaluated.

First, given that case law is the by-product of litigation, one obvious hypothesis would posit that black-owned heirs' property has not been forcibly sold with any great frequency due to the fact that few such actions are, in fact, ever initiated, irrespective of claims that there have been a large number of such court-ordered forced sales.<sup>165</sup> To this end, perhaps I uncovered only one reported case because there are simply not that many partition sale actions that are ever initiated that involve black-owned property.<sup>166</sup> Alternatively, perhaps there are few reported partition cases that result in a court-ordered sale due to the fact that these cases are settled as a result of the fact that the cotenant(s) who prefers to maintain possession lacks the resources to litigate the cases.<sup>167</sup>

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164. As mentioned, however, it is conceivable that a group of reported cases exists in which the black landowning litigant is rendered undetectable because the decision does not report his or her race. See *supra* notes 87–88 and accompanying text.

165. See *supra* notes 111, 162–63 and accompanying text.

166. See *supra* text accompanying note 88. Professor Robert Ellickson of the Yale Law School has expressed the following to me: "I've been skeptical that the 'heir property' feature of some farm ownerships significantly contributed to the demise of black farming in the South." Letter from Robert C. Ellickson, Professor, Yale Law School, to Thomas W. Mitchell, Assistant Professor, University of Wisconsin Law School (April 28, 2004) (on file with author).

167. See Stewart Macaulay, *Law and the Behavioral Sciences: Is There Any There There?*, 6 *LAW & POL'Y* 149, 152 (1984) (noting that because "[l]aw is not free,"

Even if few partition cases are initiated or are vigorously contested, legal scholars interested in sociolegal research methods could design research studies to evaluate whether the lack of contested cases masks other phenomena.

For example, there could be a significant number of transactions in which there is negotiation in the shadow of the law<sup>168</sup> that leads black landowners to make “voluntary sales,” despite the fact that they would prefer to maintain their land. In these cases, the mere threat that a partition action may be initiated could precipitate a “voluntary” transaction, at least what would appear to be a voluntary sale from the four corners of the documents recording the transaction.<sup>169</sup> Even if the

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not everyone is well-positioned to participate effectively in the legal system). Further, although the issue of black land loss does implicate basic issues of civil rights and social justice more globally, major civil rights and public interest organizations have not, for the most part, used their resources to litigate black land loss cases. Based upon my experience with different organizations that work on the issue of black land loss and a review of the limited case law, it appears that the typical black land loss case does not raise substantial state or federal constitutional issues or implicate key civil rights statutes. Therefore, in considering potential impact litigation cases, I would imagine that the typical black land loss case would not be the type of case a major civil rights or public interest law firm would be eager to litigate. Given that these cases can be so dependent on the particular facts in any given case, these cases probably hold little potential value for establishing broad-based favorable precedent for black landowners as a class.

168. See, e.g., Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968 (1979).

Divorcing parents do not bargain over the division of family wealth and custodial prerogatives in a vacuum: they bargain in the shadow of the law. The legal rules governing alimony, child support, marital property, and custody give each parent certain claims based on what each would get if the case went to trial. In other words, the outcome that the law will impose if no agreement is reached gives each parent certain bargaining chips—an endowment of sorts.

*Id.*

169. Perhaps black families situated similarly to the Beckett family realize that the resolution of the litigation involving the Beckett family’s heirs’ property is typical. To the extent that these black landowners believe that partition sale auctions typically yield below-market prices, either because the markets are rigged or the partition sales are a species of distress sales unlikely to attract many competitive bids, they may believe that it would be economically unwise to resist a partition action that is likely to end in a court-ordered partition sale under local practice.

I have observed firsthand the manner in which auctions conducted in rural counties can be rigged. As I was selecting a field site for the work to be done under the Ford Foundation grant described later in this Part, my research team visited several county registry of deeds offices in Mississippi and North Carolina, including the registry of deeds office in Bolivar County, Mississippi. In remarkable candor, the register of deeds in this county explained to us how tax sales are conducted in Bolivar County. She explained that there is no public auction; instead, Bolivar County uses a more “civilized” process. They work with the handful of real estate companies in the county and allow them to “take turns” making exclusive bids on properties that are sold at tax

sales price they were offered in negotiations does not exceed the amount the landowners could have expected to receive from a court-ordered sale, these landowners might proceed with the voluntary sale because they would avoid incurring potentially substantial fees and other litigation-related transaction costs. Such fees and transaction costs could leave them with a net loss in comparison to the money they would net from a voluntary sale, even if the court-ordered sales price considered in isolation was higher than the price the landowners could have received from private bargaining.<sup>170</sup> The legal consciousness literature could explain other cases in which racial power imbalances negatively impact the property entitlement one believes they possess irrespective of the actual property rights one may possess under the law. To the extent that a property owner who would otherwise like to keep their property does not believe that they possess the full range of property rights the legal system in fact provides to such a property owner, such a person might be convinced to sell their property to some other party who has made an offer—even if the offer was substantially below market value.

Alternatively, one might hypothesize that a number of cases involving partition actions of black-owned property have resulted in court-ordered partition sales, but that these cases have evaded detection by legal scholars due to the fact that the parties have not continued litigating these cases through successive rounds of appeals. Given that the most recent agricultural census reveals that more than 80% of black farm operators earned less than \$10,000 in annual sales,<sup>171</sup> it is apparent that many who fall into the class of black rural landowners do not have the financial wherewithal to conduct protracted litigation. Although these cases may exist, for legal researchers who rely exclusively on top-down methods of data gathering for their research, as opposed to Law and Society methods of research, records of these cases are inaccessible because they exist only in local courthouses that tend to be located in small towns dotted across the rural South.

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sales. We were informed that the register of deeds office keeps a record of which real estate company is entitled to make an uncontested bid on the properties sold at each tax sale under this closed-market, rigged bidding system.

170. See Mnookin & Kornhauser, *supra* note 168, at 971–72 (noting that transaction costs can include financial and emotional costs, and suggesting that these costs can be more substantial if litigation is involved); see also Lewan & Barclay, *supra* note 29, at 8A (describing a partition sale transaction in which \$20,000 of the \$75,000 sales price for a fifty-acre parcel was withheld from the distribution to the heirs in order to pay court costs).

171. 2002 CENSUS OF AGRICULTURE, *supra* note 21, at 9 tbl.3; see also *supra* note 25.

V. DESCRIPTION OF MY FORD FOUNDATION-SPONSORED RESEARCH PROJECT ON BLACK LAND LOSS IN RURAL NORTH CAROLINA

To follow up on my earlier work on partition sales of black-owned heirs' property, I developed an idea for a research project that would utilize a bottom-up approach to evaluate whether forced sales of black-owned property in the rural South dissipated black wealth, and whether such sales negatively impacted the participation of African Americans in various spheres of society. Given the lack of accessible case law on forced sales of black-owned rural property, I realized that it would be necessary to build a data set from scratch. In thinking about where I could obtain the needed data on real estate transactions, I realized that such data would most likely be available in the subterranean world of local registry of deeds offices. Although there is no unitary centralized database that keeps track of property transactions in the United States, detailed property records are maintained in governmental registry of deeds offices and county courthouses that are located in the more than 3000 counties that exist throughout the country.<sup>172</sup>

In order to conduct such a project, extramural funding would be essential. In February of 2002, I was awarded a three-year grant from the Ford Foundation to conduct empirical work on black land loss in the South. I serve as the principal investigator on this grant that is entitled "Forced Sales of Black-Owned Land in the Rural South: Assessing Impacts on Black Wealth and Effects on African-American Participation in Civil Society." As indicated earlier, my research team consists of two real estate economists, and a graduate student in environmental studies, who is skilled in using geographic information systems mapping technology.

I sought a field site where my research team would be able to collect data on real estate transactions involving both black and white rural property owners so that we could evaluate whether race played a meaningful role in determining whether property owners receive fair value for their property upon sale. My team spent a week traveling to more than ten counties located in rural Mississippi and North Carolina in search of an appropriate field site. Ultimately, we settled on a site in Halifax County, North Carolina, which is the poorest of all the 100 counties in North Carolina as measured by the percentage of the people

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172. See E. WADE HONE, LAND & PROPERTY RESEARCH IN THE UNITED STATES 183-84, 187 (1997); William Dollarhide, *If Your Ancestor Owned Land, There's a Deed*, GENEALOGY BULL., available at <http://www.genealogybulletin.com/archives/HTML/current37.html> (last updated Nov. 13, 2001).

in the county whose income falls below the poverty level.<sup>173</sup> I first became aware of this site through some of my programmatic work with the Land Tenure Center at the University of Wisconsin-Madison. This work involved placing law students from law schools across the country into poor communities throughout rural America that lacked access to legal services.<sup>174</sup> For certain members of these communities, such lack of legal services contributed to rendering insecure their continued land and home ownership.

At our North Carolina field site, New Deal planners built an all rural farming community in the late 1930s called the Roanoke Farms Project, where poor farm families—mostly farm families that had been either tenant farmers or sharecroppers—were settled.<sup>175</sup> These New Deal farming communities were designed along the following lines:

A typical one would be in the South. It would contain about 100 individual farm units, inhabited by either white or Negro tenants, but not by both. Each farm unit would contain from 40 to 100 acres. The house, constructed in 1937 or 1938, would be of light frame construction, with from three to five rooms and, in a majority of cases in the South, without plumbing. The farm and home practices would be closely supervised by the Resettlement Administration or its successor, the Farm Security Administration. Until 1940 the tenure would always be by lease, with rent payments usually based on a varying percentage of the annual crop production. The community would contain certain public facilities, such as a school, a community building, a co-operative cotton gin, and a warehouse. In all cases it would include from one to over a dozen co-operative enterprises, operated by a co-operative association sponsored and heavily financed by the government.<sup>176</sup>

The Roanoke Farms Project has been described as “a ‘pure’ experiment,

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173. U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, NORTH CAROLINA: 2000: SUMMARY SOCIAL, ECONOMIC, AND HOUSING CHARACTERISTICS 256-82 (2003), available at <http://www.census.gov/prod/cen2000/phc-2-35.pdf>.

174. For a current description of this project—the Land Law and Tenure Security Externship—(one I no longer direct), see Land Tenure Ctr., North Am. Program, at [http://www.ies.wisc.edu/ltc/nap/nap\\_project7.html](http://www.ies.wisc.edu/ltc/nap/nap_project7.html) (last updated Jan. 31, 2005).

175. *1,000 Men on County Projects: Halifax Ground Broken in Resettlement Move*, ROANOKE RAPIDS HERALD, Jan. 14, 1937, at 12 [hereinafter *1,000 Men on County Projects*].

176. PAUL K. CONKIN, TOMORROW A NEW WORLD: THE NEW DEAL COMMUNITY PROGRAM 168 (1959).

so to speak, in settling low income farm tenants on productive land under a long term purchase plan, with cooperative methods in use wherever possible, community features, and scientific agricultural planning."<sup>177</sup>

Furthermore, the Roanoke Farms Project stands out from the group of approximately forty-three farm communities created during the New Deal.<sup>178</sup> First of all, the project design, as approved, provided for the establishment of approximately 350 farmsteads to be located on a site that was to be comprised of 21,000 acres in total.<sup>179</sup> Based upon these initial plans at least, there were more farmsteads (or units as the Resettlement Administration called them) planned for the Roanoke Farms Project than there were for any other New Deal farm community in the country.<sup>180</sup> Each farmstead was planned to consist of approximately fifty to sixty acres of property.<sup>181</sup>

Second, the Roanoke Farms Project contained a freestanding black section that has often been analyzed alone as being one of approximately a dozen black resettlement farm communities created during the New Deal.<sup>182</sup> The creation of these black farming communities engendered a lot of hope within the black community given that African Americans had been mostly disappointed by the history of governmental land reform after Emancipation, a history that was largely one of unfulfilled promises. Memory of this history was apparent at the groundbreaking for the black section of the project as evidenced by the following: "The second spadeful was moved by 53-year-old John Jackson, Negro WPA worker, who was asked by Director [George] Mitchell whether he had ever heard of '40 acres and a mule,' replied, 'been hearing it right smart, ain't never seen it.'"<sup>183</sup>

Third, although there were a limited number of separate, "sister"

177. Charles R. Walker, *Homesteaders—New Style*, 28 SURV. GRAPHIC 377, 378 (1939).

178. CONKIN, *supra* note 176, at 332–37.

179. General Information on Roanoke Farms 1 (available in the National Archives at College Park, Maryland, Record Group 96, Records of the Farmers Home Administration: Records of the Resettlement Division, Boxes 435–36).

180. See CONKIN, *supra* note 176, at 332–37 (listing 294 farmstead units at Roanoke Farms, which is a lower number of properties, but still the highest number of any New Deal farm community listed.). It should be noted that our study indicates that approximately 200 settler families obtained initial deeds to different properties on the Roanoke Farms Project.

181. General Information on Roanoke Farms, *supra* at 179, at 1; see also *1,000 Men on County Projects*, *supra* note 175, at 12.

182. See E-mail from Robert Zabawa, Research Professor, Tuskegee University, to Thomas W. Mitchell (June 23, 2004) (on file with author).

183. *1,000 Men on County Projects*, *supra* note 175.



black and white communities organized in certain counties,<sup>184</sup> Roanoke Farms appears to be one of the only resettlement communities in the entire United States that included black and white families under the umbrella of one community.<sup>185</sup> The Roanoke Farms Project consisted of a white section (somewhat confusingly named Roanoke Farms as well) and a black section (named Tillery Farms).<sup>186</sup> Too much emphasis, however, should not be placed upon the fact that black and white families were part of one resettlement project. Consistent with the policy decision of the New Deal administrators to create homestead projects “‘according to the sociological pattern of the community,’” which in “actuality . . . meant segregated projects,”<sup>187</sup> the black and white sections of the Roanoke Farms Project were located twelve miles apart.<sup>188</sup> Nevertheless, given these characteristics, my research team thought that this site would prove to be quite a good laboratory to conduct some in-depth comparative work on the rural property owning experiences of black and whites, specifically with respect to farmstead properties first acquired by black and white settler families who were each supposed to be “at or near the bottom” of the economic pyramid.<sup>189</sup> I will now briefly summarize the type of research we have conducted thus far under the grant.

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184. Salamon, *supra* note 127, at 144–45 (“Although several projects were ‘integrated,’ what this meant in practice was that separate white and black communities were organized simultaneously on separate tracts within the same county.”).

185. See CONKIN, *supra* note 176, at 201.

186. Memorandum from Albert Maverick, Acting Director, Management Division, to C.B. Baldwin, Administrator 1 (Jan. 22, 1943) (available in the National Archives at College Park, Maryland, Record Group 96, Records of the Farmers Home Administration: Records of the Resettlement Division, Boxes 435–36).

187. See CONKIN, *supra* note 176, at 200; DIANE GHIRARDO, *BUILDING NEW COMMUNITIES: NEW DEAL AMERICA AND FASCIST ITALY* 189 (1989).

188. Letter from George S. Mitchell, to Correspondence Section, Office of the Administrator, Resettlement Administration (Dec. 16, 1936) (available in the National Archives at College Park, Maryland, Record Group 96, Records of the Farmers Home Administration: Records of the Resettlement Division, Boxes 435–36).

189. SIDNEY BALDWIN, *POVERTY AND POLITICS: THE RISE AND DECLINE OF THE FARM SECURITY ADMINISTRATION* 281 (1968); CONKIN, *supra* note 176, at 187 (stating that “[o]ne selection criteria was, of course, that the family selected be from a low-income group”). Just like other longitudinal studies that cover a significant period of time, our study is clearly not a pure experiment. Although we know the general guidelines for the New Deal resettlement projects, we do not have specific baseline information on each of the original black and white families. Cf. Salamon, *supra* note 127, at 136. Therefore, it is altogether possible that there were differences in terms of education, income, or other variables, between the initial groups of black and white settler families who first received title to the properties at the Roanoke Farms Project, and that such differences could have impacted outcomes.

### A. Quantitative Work on Property Transactions

We have built a data set—our “land registry”—that tracks the 201 properties that were the original allotted properties on the Roanoke Farms Project. In order to compile this land registry, in the summer of 2003, I hired and trained six law students from four different law schools on how to do title searching.<sup>190</sup> These students then spent the summer at the Halifax County Register of Deeds office conducting the necessary title searching. For each of the original properties at Roanoke Farms, our land registry includes completed “chains of title” that track each transaction with respect to each property over a sixty-year period. In addition, we have collected data on each recorded “deed of trust”<sup>191</sup> for any person who owned property on the project between 1943 and 2003. The information on the deeds of trust will help us evaluate whether there have been racial differences in lending patterns at our site. The real estate economists on my team will conduct statistical analyses of selected transactions in our sample using a “hedonic valuation” methodology.<sup>192</sup>

In addition to the statistical work, we have already made a number of simpler quantitative comparisons of the white and black sections at different points in time. These comparisons reveal that from the very beginning, the sections were separate, but not equal. Among other things, these comparisons highlight significant differences in the original acreage on the black and white sections of the project, both of which were supposed to be approximately 10,000 acres; significant differences in the average acreage of the original farmsteads on each section; and significant differences in the sales price per acre on the white and black sections. Preliminary analysis of our data shows that the original settler

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190. These students were drawn from the University of Wisconsin Law School, the University of North Carolina School of Law, Duke University School of Law, and William and Mary School of Law.

191. In North Carolina, loans are often secured by interests in real property as evidenced by a deed of trust. *See, e.g.,* *Assocs. Fin. Servs. of Am. Inc. v. N.C. Farm Bureau Mut. Ins. Co.*, 528 S.E.2d 621 (N.C. Ct. App. 2000).

192. The method of hedonic equations is one way expenditures on land or other real estate can be decomposed into measurable prices and quantities so that rents or asset prices for different properties can be predicted and compared. A hedonic equation is a regression of some measure of expenditure—rents, values, or sales prices—on the characteristics of the real estate. Hedonic models can actually be used for many purposes and in many forms. However, our purpose here is straightforward: to use hedonic models to “price out” the value of properties sold by African American landowners, using coefficients from transactions entered into by whites. Standard statistical tests can then be used to elucidate whether black landowners receive, on average, similar prices to white landowners selling similar land in similar circumstances. *See generally* Stephen Malpezzi, *Hedonic Pricing Models: A Selective and Applied Review*, in *HOUSING ECONOMICS AND PUBLIC POLICY: ESSAYS IN HONOUR OF DUNCAN MACLENNAN* 67 (Tony O’Sullivan & Kenneth Gibb eds., 2003).

families on the Roanoke Farms section were allotted 9322 acres in the aggregate, and the original settler families on the Tillery Farms sections were allotted 6754 acres. Further, the average acreage of the farmsteads for the original settlers on the Roanoke Farms section was 86.89 acres, and the average acreage of the farmsteads for the original settlers on the Tillery Farms section was 66.89 acres. In terms of sales prices, the average price per acre for the original farmsteads on the Roanoke Farms section was \$40.17 per acre; the average price per acre for the original farmsteads on the Tillery Farms section was \$50.28 per acre, 25% more per acre than the prices paid by the original Roanoke Farms settlers. In each instance as can be seen, the white farm families were advantaged. Today, there are significant differences in the current racial compositions of the property. Whites still own almost all of the property on the former white section of the New Deal project; in contrast, there has been significant black land loss on the Tillery Farms section.

### *B. Other Archival Work*

To supplement the quantitative data that we have compiled from records at the Halifax County Register of Deeds office, I have collected a large amount of archival data from a number of archives, including the National Archives office in College Park, Maryland, the North Carolina State Archives, the North Carolina Historic Preservation Office, the Concerned Citizens of Tillery (“CCT”) (a community-based organization in Tillery, North Carolina), the Library of Congress, and other sources. Many of these documents further highlight that the white and black sections were never equal in the beginning despite the plans of the New Deal administrators. One of the documents I have found appears to reveal that nearly all of the white farm families were given a tobacco allotment for 1940; in contrast, only 30% of the black families appear to have been given a tobacco allotment in that year.<sup>193</sup> This appears to be consistent with the different plans for the black and white sections as indicated in a 1937 letter from a regional director of the Resettlement Administration to the West Virginia state director of rural rehabilitation for the Resettlement Administration. In part, this letter states:

Roanoke Farms, RF-NC-10, is located in Halifax County near

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193. The difference in the distribution of tobacco allotments was potentially very significant because tobacco displaced cotton as the major cash crop in North Carolina in the early part of the twentieth century. See N.C. Dep’t of Agric. & Consumer Servs., North Carolina Agriculture Overview: Field Crops, at [http://www.agr.state.nc.us/stats/general/crop\\_fld.htm](http://www.agr.state.nc.us/stats/general/crop_fld.htm) (last updated Mar. 18, 2003).

Enfield, North Carolina. The project will consist of 250 units in two sections, one of which is for white families and the other for Negro families. The leading crops to be grown on the units for Negroes will be cotton, corn, peanuts, soja beans, and peas. On the units for the white families, the leading crops will be those listed above with the addition of tobacco.<sup>194</sup>

Further, it turns out that the black section was partially situated on the flood plain, which resulted in severe destruction to property and crops in later years.<sup>195</sup> According to families on the white section that I have interviewed, the white section is not located on the flood plain and has never experienced any significant flooding. Further, the documents reveal that the white section was not originally planned, but was considered to be politically necessary to keep the project viable after it became clear that almost all of the families who met the income requirements in the five counties from which families were to be originally selected were black. To this end, one document from the National Archives that I have obtained states the following:

As you know, the prospective clients in this area are mostly negroes. The local leaders here do not want a strictly negro settlement, but would prefer a mixed [colony]: white clients on the north side and negro clients on the south and east. They want enough white population in the area to control the social as well as the political issues that might come up.<sup>196</sup>

Given this anticipated local resistance to an all black project, New Deal planners ultimately decided to add the white section and decided to recruit families from all over North Carolina and nearby states in order to get sufficient numbers of eligible white families.<sup>197</sup>

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194. Letter from George S. Mitchell, Regional Director, Resettlement Administration—Region IV, to Mr. R.G. Ellyson, State Director Rural Rehabilitation, Resettlement Administration (Feb. 1, 1937) (available in the National Archives at Morrow, Georgia, Record Group 96, Records of the Farmers Home Administration: Records of the Resettlement Division, Box RG96-E82-2).

195. See generally Cornelia Janke, Tillery, North Carolina: One Hundred Years of Struggle in a Black Community 73 (1986) (unpublished history honors thesis, Duke University) (on file with author).

196. Memorandum from A.M. Johnson, Resettlement Representative, to Homer H.B. Mask, Regional Director Rural Resettlement 2 (Sept. 28, 1935) (available in the National Archives at Morrow, Georgia, Record Group 96, Records of the Farmers Home Administration: Records of the Resettlement Division, Box RG96-E78-2).

197. The decision to add a white section at Roanoke Farms was a more progressive response to white resistance than was the response to white resistance at other potential sites where black farm communities were planned. To this end, Professor Paul Conkin noted:

The archival data also includes historical photographs of our field site. I obtained some photographs from the Library of Congress that were taken in the late 1930s. I acquired other photographs from the North Carolina Historic Preservation Office that document our field site at various points from the 1930s through the late 1980s. Finally, in the past couple of years, I have taken pictures of the site as it looks today. Collectively, these pictures provide graphic evidence of the manner in which the black and white sections have grown increasingly unequal over sixty years.

In terms of doing this "bottom-up" data gathering, individuals and families that I have met at my field site have been incredibly generous with their time and resources. They have given me access to many documents. They have allowed me to interview them in their homes and they have identified other key sources. They have invited my research team to community meetings that have been quite moving.

I have attempted to conduct the research on this project in a manner that is not purely extractive. After identifying all of the original settler families, I collected this information in a binder and presented it to the CCT, an active community-based organization that consists of many of the families from what had been the black section of the Roanoke Farms Project. I intend to do the same for some of the families I met in Halifax County whose relatives became landowners on the white section of the Roanoke Farms Project during the 1940s. In addition, once our study is complete, I look forward to sharing the results of our research study with people in Halifax County more generally and have already been invited to do so at the annual Halifax County Harvest Days Festival.

### C. *Early Lessons Learned*

We are now concentrating most of our efforts on analyzing the data we have gathered. Although our efforts in this respect are in progress,

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The early failure to provide Negro projects was summed up by the Division of Subsistence Homesteads as follows: "The fact remains that numerous protests on the part of white citizens against colored project locations have been one of the major contributing causes of failure." When Ralph Borsodi was planning a Negro project near Dayton, 1,100 citizens from three townships petitioned him and the Division of Subsistence Homesteads not to construct such a project, since it would allegedly mean Negroes in white schools, Negro children playing with white children, and a depreciation of property values. When a Negro project was planned for Indianapolis, Representative Louis Ludlow, the congressman from the area, received numerous complaints and made a protest against the proposed project to the Division of Subsistence Homesteads. Definite obstructionism in Indianapolis prevented the acquisition of any suitable site.

CONKIN, *supra* note 176, at 201 (footnotes omitted).

we have already discovered some things that have shed important light on forced sales of black-owned property and reinforced our belief in the importance of doing empirical work on such understudied areas of the law. For example, our archival work has only reinforced our belief that place-based strategies designed to alleviate poverty must take account of the social context in which the group of people targeted for assistance live. The Roanoke Farms Project demonstrates that class-based programs that refuse to take into account the realities of race, whether due to naïveté or political expediency will not realize their full potential in places where minorities have long been racially subordinated. Further, property scholarship that relies upon untested “high theory” that does not take account of factors such as race may often result in thin legal analyses that fail to account in any precise manner for the ways in which property law actually impacts people in their everyday lives.

In addition, our analysis of the different types of sales transactions in our land registry has not confirmed some of the claims made by some black land loss activists. Although there has been significant black land loss over the course of sixty years with respect to the properties that constituted the former Tillery Farms section of the resettlement project, a review of the different types of forced sales transactions in our data set has uncovered comparatively few partition sales. Of all the various types of forced sales recorded in our data set, foreclosures are by far the most prevalent. This suggests—and I must emphasize that it simply suggests given the limited number of properties that are in our data set—that some of those who are working to preserve black-owned land may have overestimated the degree to which partition sales have been a source of black land loss. At a minimum, our preliminary findings suggest that activists and policymakers would benefit from more empirical studies that could better flesh out the patterns and primary causes of black land loss.

## VI. CONCLUSION

The research on my project has literally made visible the two different trajectories taken by farm families over the course of sixty years on the white and black sections of the Roanoke Farms Project. My research has informed many people in Halifax County that the Roanoke Farms section—a section initially designed for poor white farm families in the late 1930s and early 1940s that is today virtually indistinguishable from the white, middle class properties in its immediate vicinity—had its roots in a New Deal project designed to uplift very poor farm families. Rendering visible the manner in which race has privileged the white farm families, and disadvantaged the black farm families who participated in the New Deal project, would not have

been possible without spending months in the Halifax County Register of Deeds office, in other archives, in people's homes, and in community meetings.

Further, our project holds the potential to make a contribution by the mere fact that we have built a data set from scratch, our land registry. With analysis of hard data, we hope to produce work that will evaluate competing property theories that have been heretofore subjected to little empirical analysis, or have been evaluated at times in a tautological manner. In order that others may conduct their own empirical analyses, we intend to make our data set public upon completion of our study.

As indicated, not only does such scholarship that uses New Legal Realism methodologies afford obvious comparative advantages in bringing to light the manner in which law impacts people in their everyday lives, it also has the potential to make a difference at the level of policy. For example, the AP's *Torn from the Land* series was not only interesting, but it also influenced some policymakers to take action. For example, in 2002, the Alabama legislature voted to establish the African American Land Loss Task Force to investigate whether the State of Alabama had illegally taken land from African Americans. In addition, the Governor of Alabama returned land to at least one black family that had been featured in the AP series.<sup>198</sup> Further, the AP series inspired U.S. Representative John Conyers and others in the Congressional Black Caucus to sponsor a "town hall" meeting in the U.S. House of Representatives to discuss black land loss issues.<sup>199</sup> Similarly, my research team hopes that the results of our work, including our empirical work, will prove to be of interest to a broad audience including academics, community-based organizations, and policymakers, particularly those with an interest in working on developing policies that address black land loss issues specifically or asset building more broadly within rural African American communities.<sup>200</sup>

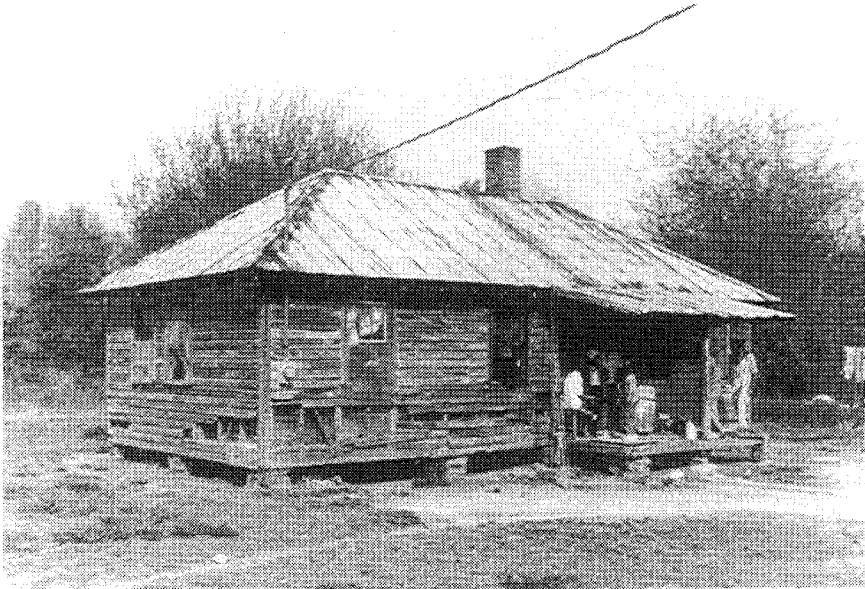
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198. Linedda McIver, *Blacks Driven and Cheated Out of Their Land*, BLACK COLLEGIAN, Feb. 2003, at 100, 100.

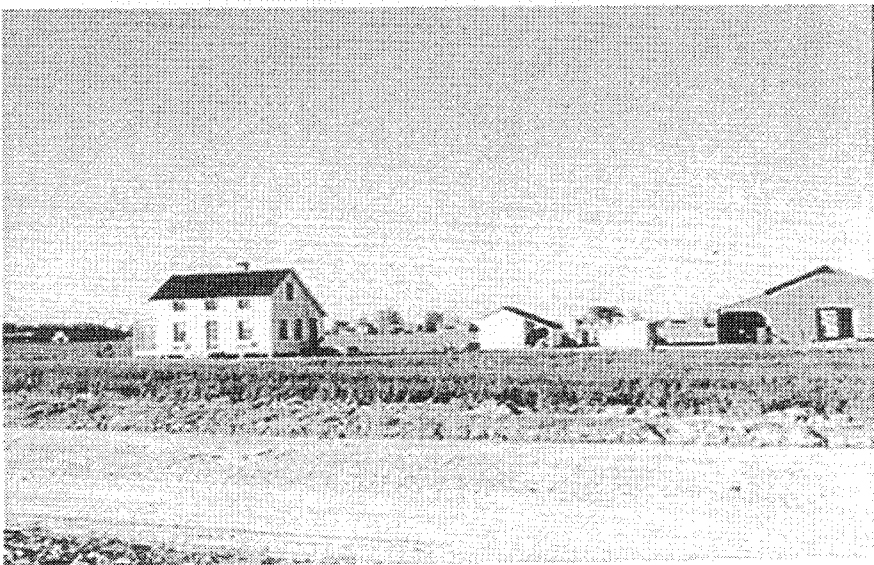
199. See *supra* note 82 and accompanying text.

200. It is often said that a picture speaks a thousand words. In this vein, I have been able to collect a number of photographs of my field site from the Library of Congress, the North Carolina Historic Preservation Office, individual families and others. Together with photographs that my research team has taken of our field site in the past three years, many of these photos are very suggestive and lend themselves to their own kind of time series analysis. They have certainly made this research project come to life, at least based upon the feedback I have received from different audiences to whom I have presented our research. I have selected a small number of these photos for inclusion in this Article in order to give the reader a better sense of the genesis, operation, and legacy of the Roanoke Farms Resettlement Project. A couple of these photos also visually demonstrate the nature of the "bottom-up" research strategy my

APPENDIX



Sharecropper's shack, Tillery, NC. *Circa 1930s*



Typical Roanoke Farms Resettlement homestead with farmhouse, smokehouse, chicken coop, and barn. Tillery Farms section is shown. *Circa late 1930s*

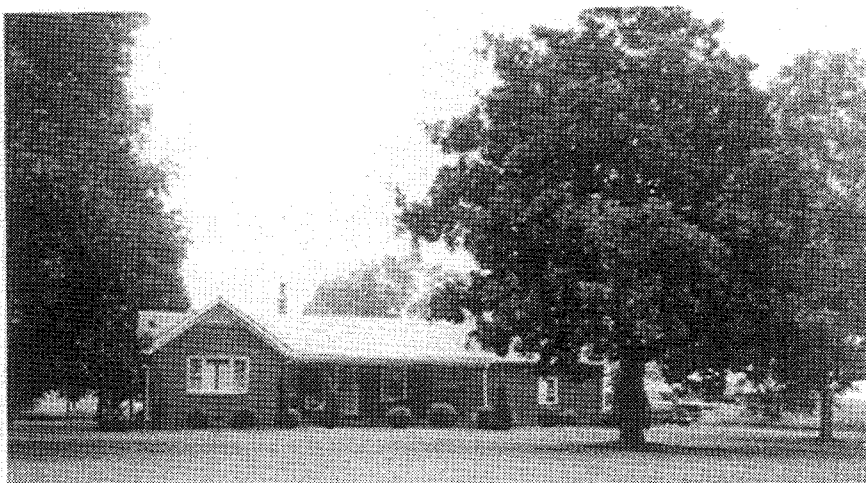




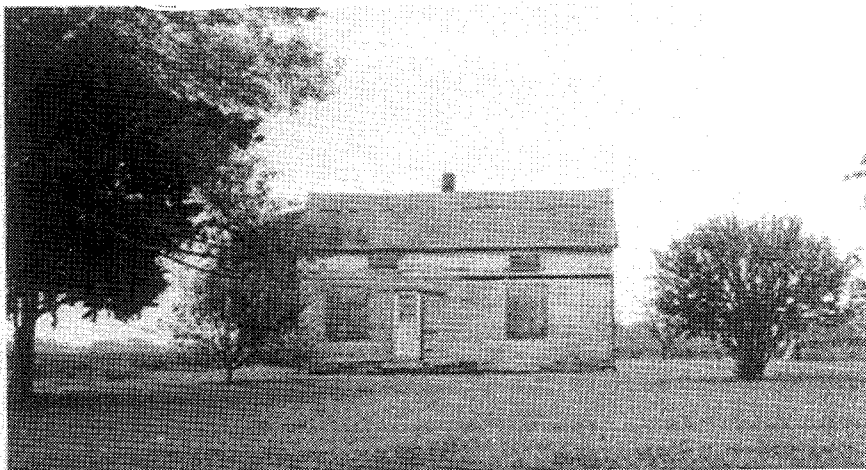
Men construct a prefabricated house at Roanoke Farms Resettlement.  
*Circa late 1930s*



Farmer at Tillery Farms plowing a field. *Circa late 1930s*



Improved “resettlement” dwelling on Roanoke Farms section in 2003: bricked over and enlarged.



“Resettlement” dwelling on Tillery Farms section in 2003: shuttered and vacant.



Halifax County Courthouse,  
location of the Register of Deeds office (2003 photo)



Law student team members at the Halifax County, N.C. Register of  
Deeds office researching titles for land registry in 2003.



Members of the Concerned Citizens of Tillery meet weekly in the Tillery Community Center, formerly the Tillery Farms section's "Project Store." (2003 photo)



The author, members of research team, Bentley Mohorn and family in front of the Mohorn Roanoke Farms dwelling in 2003.

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