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SLAVERY AND TORT LAW

Keith N. Hylton

07/2004

Abstract: This paper evaluates the claim for slavery reparations from a torts perspective. I start with an examination of the injuries inflicted on slaves, and the extent to which tort law provides a vehicle for redressing these injuries. I then take up the question of “derivative claims,” claims brought by someone other than the direct victim, a category which covers the reparations complaint. Lastly, I discuss the accounting demand by the reparations plaintiffs. The derivative status of reparations claims presents special obstacles for plaintiffs. However, applying today’s law to slavery should be viewed as bringing law to a regime from which it had been entirely displaced, not as a retroactive application of a different set of rules. The more troubling problem for plaintiffs is the passage of time. After enough time has passed, tort doctrine shuts the door on claims based on old and distant injuries. It appears that the only component of reparations lawsuits that has the potential for social gain is the demand for an accounting.

Professor of Law, Boston University, knhylton@bu.edu. I thank Jack Beermann, Alfred Brophy, Ron Cass, Hanoch Dagan, Adrienne Davis, David Lyons, Allan Macurdy, Rusty Park, Tony Sebok, Ken Simons for helpful discussions and/or written comments. I also thank fellow conference participants – Richard Epstein, Jim Hackney, Dennis Klimchuk, Andrew Kull, Saul Levmore, Kyle Logue, Emily Sherwin – for insightful comments made in the course of the meeting that either led me to correct mistakes in my thinking or avoid additional ones. I take responsibility for errors that remain in this paper.

On March 26, 2002 a class action complaint seeking reparations for slavery was filed in the federal district court for the Eastern District of New York under the name *Farmer-Paellman v. FleetBoston*.¹ The defendants were FleetBoston Financial Corporation (a bank), Aetna (an insurance company), CSX (a railroad) and a large number of unnamed corporations described as “Corporate Does Numbers 1 – 1000.”² The complaint asked for restitution, compensatory damages, punitive damages, and an accounting of the profits earned by the predecessors of these firms from slavery.³

The *FleetBoston* complaint took an issue that had been discussed as a theoretical matter for generations and turned it into a living animal with the potential to bite someone. For up until the date of the complaint, the reparations debate had been conducted largely among friends and receptive audiences. Anyone who objected to the notion of paying reparations for slavery could ignore the issue, and most people did. One member of Congress, John Conyers, introduced a bill seeking slavery reparations twelve years in a row, each time meeting a lopsided defeat and a collective yawn from his

¹ Of course, I am referring to slavery in the American South, before its abolition in 1865. For the complaint, see Complaint and Jury Trial Demand, *Farmer-Paellman v. FleetBoston Fin. Corp.*, (E.D.N.Y. 2002)(No. CV 02-1862), available at <http://news.findlaw.com/cnn/docs/slavery/>. The complaint was later consolidated with other cases and dismissed in *African-American Slave Descendants Litigation*, ___ F. Supp. 2d (N.D. Ill. 2004). An amended complaint was later filed on April 5th, 2004, see *Second Consolidated and Amended Complaint and Jury Trial Demand, African American Slave Descendants Litigation* (N.D. Ill. 2004) (No. 02-7764). Although this appears to be the first class action complaint seeking compensation for slavery from American corporations, it is not the first complaint seeking reparations for American slavery. See, e.g., *Jackson v. U.S.*, No. C94-01494 cw, 1994 U.S. Dist. LEXIS 7872 (N.D. Cal. June 13, 1994); *Bell v. U.S.* No. 3:01-CV-0338-D, 2001 U.S. Dist. LEXIS 14812 (N.D. Tex. July 10, 2001); *Cato, v. U.S.*, 70 F.3d 1103 (9th Cir. 1995); *Obadele, v. U.S.* 52 Fed. Cl. 432 (2002). For United States court decisions on slavery claims arising from the Holocaust, see *Burger-Fischer v. Siemens AG*, 65 F. Supp. 2d 248 (D.N.J. 1999); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424 (D.N.J. 1999). For an attempt to distinguish different types of reparation claim, see Keith N. Hylton, *A Framework for Reparations Claims*, 24 *Boston College Third World Law Journal* 31 (co-keynote address, symposium on reparations) (2004).

² Complaint and Jury Trial Demand at 1, *Farmer-Paellman* (No.CV 02-1892)

³ *Id.* at 7.

colleagues.⁴ The class action suit, though a long shot from the start for the plaintiffs, represented a significant change in the terms of the debate.

This paper evaluates the claim for slavery reparations from a torts perspective.⁵ I start with an examination of the injuries inflicted on slaves, and the extent to which tort law provides a vehicle for redressing these injuries. I then take up the question of “derivative claims,” claims brought by someone other than the direct victim, a category which covers the reparations complaint. Tort law, for the most part, has not been

⁴ Second Consolidated and Amended Complaint and Jury Trial Demand at 17, African American Slave Descendants Litigation (No. 02-7764); Robert Westley, *Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?*, 40 B.C. L. Rev. 429, 433 (1998).

⁵ For earlier legal analyses of reparations claims based on American slavery, see Boris Bittker, *The Case for Black Reparations* (New York: Random House, 1973); Eric K. Yamamoto, *Racial Reparations: Japanese American and African American Claims*, 40 B. C. L. Rev. 477 (1998); Westley, *supra* note 4; Rhonda V. Magee, *The Master’s Tools, from the Bottom Up: Responses to African-American Reparations Theory in Mainstream and Outsider Remedies Discourse*, 79 Virginia L. Rev. 876 (1993); Tuneen E. Chisolm, *Sweeping Around Your Own Front Door: Examining the Argument for African American Reparations*, 147 U. Pa. L. Rev. 677 (1999); Irm Jacqueline Ozer, *Reparations for African Americans*, 41 How. L. J. 479 (1998); Note, *Bridging the Color Line: The Power of African American Reparations to Redirect America’s Future*, 115 Harv. L. Rev. 1689 (2002); Anthony E. Cook, *Race and Religion: Revising “America’s Most Segregated Hour”: Kind and the Beloved Community: A Communitarian Defense for Black Reparations*, 68 Geo. Wash. L. Rev. 959 (2000); Anthony J. Sebok, *Reparations, Unjust Enrichment, and the Importance of Knowing the Difference Between the Two*, 58 N.Y. U. Ann. Surv. Am. L. 651 (2003); Vincene Verdun, *If the Shoe Fits, Wear It: An Analysis of Reparations to African Americans*, 67 Tul. L. Rev. 597 (1993). On reparations for the Holocaust, see Libby Adler & Peter Zumbansen, *The Forgetfulness of the Noblesse: A Critique of the German Foundation Law Compensating Slave and Forced Laborers of the Third Reich*, 39 Harv. J. on Legis. 1 (2002); Michael J. Bazylar, *Austin Owen Lecture: Litigating the Holocaust*, 33 U. Rich. L. Rev. 601 (1999); Darcie L. Christopher, *Jus Cogens, Reparations Agreements, and Holocaust Slave Labor Litigation*, 31 Law & Pol’y. Int’l Bus. 1227 (2000); Dian Richard Foos, *Civil Procedure: Righting Past Wrongs or Interfering with International Relations? World War II-Era Slave Labor Victims Receive Legal Standing After Fifty Years*, 31 McGeorge L. Rev. 221 (2000). On Japanese Americans, see Shirley Castelnuovo, *With Liberty and Justice for Some: The Case for Compensation to Japanese American Imprisoned during World War II*, in *Japanese Americans: From Relocation to Redress* (Roger Daniels et al. eds., 1991); Eric K. Yamamoto, *Friend, Foe or Something Else: Social Meanings of Redress and Reparations*, 20 Denv. J. Int’l L. & Pol’y 223 (1992); Harry N. Scheiber, *Taking Responsibility: Moral and Historical Perspectives on the Japanese War Reparations Issue*, 20 Berkeley J. Int’l L. 233 (2002); Eric A. Posner and Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 Columbia L. Rev. 689 (2003). For an application of public choice theory to reparations (slavery, Holocaust, and others), see Saul Levmore, *Changes, Anticipations, and Reparations*, 99 Columbia L. Rev. 1657 (1999). For an excellent review of the literature and law on reparations, see Alfred L. Brophy, *Taking Reparations Seriously: Understanding Reparations for Slavery and Jim Crow* (book manuscript on file with author).

receptive to derivative claims.⁶ Lastly, I discuss the accounting demand by the reparations plaintiffs.

Tort doctrine appears to be inadequate as a means of converting the injuries to slaves into claims for damages. Slavery involves some obvious torts, such as assault and battery, conversion, and wrongful confinement. For these a person held as a slave today could surely collect damages.⁷ However, slavery also involves a category of “social torts” that are equally if not more harmful, for which tort law appears, even today, to be inadequate a means of seeking compensation. Among these social torts are the slave marriage, the deprivation of status, and the denial of religious freedom. Traditional tort doctrine does not seem to have any readily available “forms of action” for these injuries. And yet it is the social torts that are potentially most damaging to slave descendants because, like a constantly mutating virus, they have the capacity to return to injure successive generations.

Of course, reparations claims are derivative in the sense that they are not brought by direct victims, and thus the fact that a person held as a slave today could collect damages does not tell us whether descendants of slaves should be able to seek compensation through the tort system. The derivative status of reparations claims presents special obstacles for plaintiffs. However, the fact that slavery was entirely within the law when it was practiced should not be viewed as a substantial obstacle. The slaveholder sought a regime in which the law would not constrain him at all in his dealings with slaves. Applying today’s law to that relationship should be viewed as

⁶ Part III.A, *infra*. Modern reparations claims, as a special type of derivative tort claim, have not fared well. For a history of modern reparations claims based on American slavery, see Brophy, *supra* note 5, chapter 4.

⁷ This is supported by the 19th century cases involving slaves who were awarded damages for wrongful imprisonment, see Andrew Kull, *Restitution in Favor of Former Slaves*, 84 *Boston University Law Review* (forthcoming 2004).

bringing law to a regime from which it had been entirely displaced, not as a retroactive application of a different set of rules. The more troubling problem for plaintiffs is the passage of time.⁸ After enough time has passed, tort doctrine shuts the door on compensation claims based on old and distant injuries. The *FleetBoston* complaint and its progeny are clearly vulnerable to this argument.

It appears that the only component of the new reparations claims that has the potential for social gain is the demand for an accounting. Information on slavery's victims and how they were hurt has been readily available for a long time. Information on slavery's beneficiaries and precisely how they profited should also be in the public's hands, for it has the potential to clarify perceptions on the social costs of slavery, bring about a more honest exchange on racial issues, and reduce incentives to discriminate in the present. I would prefer to see the scope of the demand expanded to include information not only on profits from slavery, but also profits from oppressive and discriminatory regimes that appeared in its wake.

II. Torts of Slavery

The first question that should be addressed is the precise tort claims that descendants of slaves might have. Their claims are derivative of their ancestors. Thus, in order to understand the precise injury claims of descendants, we must understand the injury claims of ancestors. Let us imagine, then, that a man or woman held as a slave

⁸ Richard Epstein reaches a similar conclusion in his contribution to this symposium, see Epstein, *The Case Against Black Reparations*, 84 *Boston Univ. L. Rev.* (forthcoming 2004).

were to bring a tort suit against defendants involved in the slavery institution. What sort of claims would the victim bring?

The harms done to African Americans in the period of slavery are well recorded – so well recorded that I could contribute little here beyond a mere listing of the numerous references, perhaps beginning with Kenneth Stampp’s *The Peculiar Institution*.⁹ I will, instead, draw from a source that one hardly sees mentioned in the treatments of slavery, Adam Smith, author of *The Wealth of Nations*. Before Smith wrote *The Wealth of Nations*, he wrote another book, really a set of lecture notes, titled *Lectures on Jurisprudence*.¹⁰ In *Lectures*, which should be regarded as the first comprehensive “law and economics” book ever written,¹¹ we find a spell binding description of the social costs of slavery.¹² Smith takes a close look at Roman slavery.

⁹ Kenneth M. Stampp, *The Peculiar Institution: Slavery in the Ante-Bellum South* (1956).

¹⁰ Adam Smith, *Lectures on Jurisprudence: The Glasgow Edition* (R.L. Meek et al eds., Oxford University Press 1978) (1762-65).

¹¹ Smith’s *Lectures on Jurisprudence*, written around 1762-65 is a pretty comprehensive treatment of law, largely from an economic perspective. The next such treatment would not appear until Posner’s *Economic Analysis of Law*, first published in 1973 (Richard A. Posner, *Economic Analysis of Law* (1973)) – a roughly 210 year difference, which gives one a sense of how far Smith was ahead of his time. Before Smith’s lectures, there were other discussions of law that introduced many of the core approaches of law and economics, but these approaches focused on specific parts of the law. Beccaria, writing around the same time as Smith, took a utilitarian approach to criminal punishment. Cesare Beccaria, *On Crimes and Punishments* (Henry Paolucci ed., Bobbs-Merrill 1963)(1764). Hume, writing around 1740, also took an instrumentalist approach and laid important foundations for the economics of property law. See David Hume, *Treatise of Human Nature* 484-501 (Prometheus Books 1992) (1737) (discussing norms and development of property rights). Hobbes, writing in the 1670s, well before Smith, advanced an instrumentalist approach to the law that put social welfare maximization (of course he did not use these words) as its primary goal. See Thomas Hobbes, *A Dialogue Between a Philosopher and a Student of the Common Laws of England* (Joseph Cropsey ed., Univ. of Chicago Press 1971) (1681). After Smith, we have Bentham, who arguably was the key figure in the development of law and economics. Holmes, 100 years after Bentham, used economic arguments to explain large pieces of the common law. See Oliver Wendell Holmes, Jr., *The Common Law* (Little, Brown & Co. 1990) (1881).

¹² The reader may ask why I would rely on Adam Smith when there are other spellbinding accounts of slavery, such as Stampp’s, many of which have the benefit of hindsight. The reason is Smith’s tendency to generalize, model, and reduce complex problems to essential components. This is clear in all of Smith’s work, and is probably the reason *The Wealth of Nations* is considered by many to have launched economics as an independent discipline. Smith’s account of slavery in *Lectures on Jurisprudence* reveals the same tendency to hone in on a basic theoretical architecture, which one can examine from an infinite number of perspectives. A surprising number of Stampp’s observations on slavery are implied by Smith’s generalizations.

Smith begins with a discussion of the “private costs” of slavery, those borne by slaves.¹³ These are the costs that would form the basis of a tort claim against a slave holder. Smith starts with the obvious ones: the slave’s life, liberty, and property were in the hands of his master.

His authority was not like that of a father over his children, which only executed by the private will of the father the sentence which the laws of the country would have given, but was altogether arbitrary; he might put a slave to death on the smallest transgression, or the slightest neglect of his commands, and no fault was to be found in him.¹⁴

We see at once that whether we are talking about Roman slavery or American slavery, it is a regime in which slave and master have a special relationship under the law unlike that of any other legal relationship. One is completely subject to the will of the other. The slave could be killed, beat, raped, or overworked without any threat of legal intervention by the state.¹⁵ The slave’s property belonged to the master, at least as far as the law was concerned, so the master could take whatever pieces the slave had saved through his efforts whenever it suited him.

There is something very important in Smith’s first words on the master-slave relationship that goes to the core of the institution. What is truly special about slavery is the absence of government regulation. Indeed, slavery can be defined as the absence of the threat of the government intervening to regulate a relationship between any two individuals. Some might call this freedom. But we see in the case of slavery a

¹³ Smith, *supra* note 7, at 176-181.

¹⁴ Smith at 176.

¹⁵ As Stampff notes, there were some legal constraints on slaveholders in the South, see Stampff at 219-20. However, these constraints, in the end, put few obstacles in the way of most slaveholders, *id.* at 222-24. See also Stanley M Elkins, *Slavery: A Problem in the American Institutional and Intellectual Life* 56-58 (University Library ed. 1963). For a detailed presentation of the legal constraints on slaveholders, see Thomas D. Morris, *Southern Slavery and the Law, 1619-1860* 161-208 (1996) (covering constraints on abuse and murder of slaves).

perversion of the concept of freedom, an example of what Popper described as the paradox of freedom.¹⁶ The absence of the threat of government intervention means that the stronger party enslaves the weaker party. This denies freedom to the weaker party.

The “paradox of freedom” involves a tradeoff in which the weaker party loses its freedom while the stronger party’s freedom grows, so that absolute freedom results, in the end, in the greater mass losing their freedom. The case of slavery provides an interesting and disturbing version. For as Smith makes clear in his treatment (and as I hope to make clear in this discussion), the institution of slavery leads to a reduction in the freedom of both parties. The institution shows the classic features of the Prisoner’s Dilemma,¹⁷ though in sequential form. The first party’s move, the enslaver, sets off a chain of events that leave both slave and master in an inferior welfare position relative to what they would have had in the absence of slavery.

There is another sense in which slavery seems to be unique, special, or in Stamp’s words, peculiar.¹⁸ The paradox of freedom problem has the simple Kantian solution: each individual should have as much freedom as is compatible with a like freedom on the part of others. To be sure, this is a vague formula that doesn’t take us far in solving real problems. However, it appears to be right, and one might say it is the moral starting point for law, in so far as it attempts to regulate the relationship between two individuals. And in the end, all law aims to regulate the relationships among individuals. Even when it seems to be regulating the relationship between an individual and an inanimate object, like a rock, it does so only to prevent harm to another individual.

¹⁶ Karl R. Popper, *The Open Society and its Enemies: The High Tide of a Prophecy: Hegel, Marx and the Aftermath* 44 (Princeton Univ. Press, 5th ed. 1966).

¹⁷ R. Duncan Luce & Howard Raiffa, *Games and Decisions: Introduction and Critical Survey* 95 (1957).

¹⁸ Stamp explains that the term “peculiar institution” was used by Southerners themselves to describe slavery, Stamp at 3.

We see in the institution of slavery an example in which the Kantian formula's practical message is incomprehensible. There is no golden mean, no point at which the slaveholder's freedom is in some morally acceptable balance with the slave's. We stare at it, and we see a moral vacuum. Stamppp tells us that the southern legislatures and the courts pretended here and there to fill this empty space with constraints, but these efforts, if they were serious at all, proved futile.¹⁹ Laws ostensibly designed to constrain the slaveholder were insufficient in practice to be effective, because they were overwhelmed by other procedural and substantive rules designed to give leeway for the slaveholder's whim to control.²⁰

Given the nature of this relationship, one would expect life for the slave to be one long continuous tort. The relationship is bursting with an infinite number of potential torts. In spite of this, they can be grouped, almost all of them, into a few broad legal categories: assault and battery, conversion, false imprisonment. I have left out wrongful death and negligence. Wrongful death is a claim that might be brought by the relative of a slave for the loss of financial support, though it runs into the problem that the slave was entirely under the care of the master; the slave was not a direct source of income or support for any of his family members. Negligence might be brought for carelessly overworking a slave, but this claim is superseded by the intentional torts that come well before it. Wrongful imprisonment is one of those torts. Under the standard doctrine, the

¹⁹ Stamppp, 219-24.

²⁰ *Id.* at 222-24. In particular, the most important protection was the inability of slaves to initiate a legal proceeding or to testify against a white person in court. *Id.* at 222. Frederick Douglass identified the legal barriers to slaves as one of the main reasons violence could be used as a tool of control on slave farms. See *Narrative of the Life of Frederick Douglass, An American Slave, Written by Himself* 52 (David W. Blight, ed., The Bedford Series in History and Culture, 1993) (hereinafter *Douglass Narrative*) ("Mr. Gore's... horrid crime was not even submitted to judicial investigation. It was committed in the presence of slaves, and they of course could neither institute a suit, nor testify against him; and thus the guilty perpetrator of one of the bloodiest and most foul murders goes unwhipped of justice, and uncensored by the community in which he lives.").

defendant is held liable for all injuries, foreseeable or not, connected to the confinement.²¹ Overworking a slave is an injury connected to the initial decision to confine him without a legal right. Given this, there seems to be no need to bring a negligence claim.

But hold on, says the slaveholder, the term “legal right” (which I just mentioned) has to be brought into this discussion a little more. Before the Thirteenth Amendment, slavery was entirely legal in the southern states.²² Moreover, the “slave codes” explicitly authorized the treatment most slaveholders gave to their slaves.²³ In view of this, the slaveholder would argue, lawsuits brought by former slaves should be dismissed. There were no breaches of any legal duties. The slaveholders complied with the law existing at the time. And it is understood, under tort doctrine, that before you can hold someone liable for damages, you must find that he breached a legal duty.

How about that? Should courts simply dismiss reparations lawsuits on the ground that the claims are derivative of a group of victims who themselves would have had no right to sue for their injuries? One response, already incorporated in the complaint filed by reparations plaintiffs, is that this is a suit for restitution, based on a theory of unjust enrichment. But this does not easily evade the slaveholder’s objection, because the harms for which reparations plaintiffs have brought suit were entirely within and sanctioned by the law when they occurred. The slaveholders did not, in bad faith, violate

²¹ William L. Prosser, *Handbook of the Law of Torts* 43 (1971)(noting similarity to trespass doctrine).

²² On the progression of the law toward the abolition of slavery and the Thirteenth Amendment, see Harold W. Horowitz & Kenneth L. Karst, *Law, Lawyers and Social Change: Cases and Materials on the Abolition of Slavery, Racial Segregation and Inequality of Educational Opportunity* 41-109 (1969).

²³ Stamp, at 196-236 (discussing slave codes).

or take advantage of a gap in the law or someone's mistake – features that appear to be common in restitution claims.²⁴

Another response is to point to the fact that some slaveholders did violate the laws of their time. Some violated bans on slave trading, or murdered slaves in violation of laws on the books.²⁵ These cases easily get around the problem of legal approval, but they probably amount to a few tiny drops within a vast sea of cruelties. I doubt there are enough of these cases to support a class action lawsuit.

There is no getting around the fact that any attempt to apply tort law to slavery means applying today's law to an institution that existed within the law a century and half ago. When one focuses exclusively on the specific torts of slavery, this doesn't seem to be a morally troubling outcome. However, it is troubling, viewed generally. Applying today's law to events that happened within the law yesterday opens up a messy can of worms, to say the least. And once courts go along with plaintiffs and open up that can, it is not easy to see why the plaintiffs' approach should be confined to slavery lawsuits.²⁶

I think there is a limiting principle for an exception in the case of slavery – an exception that would permit us to apply today's tort law to the institution. The limiting

²⁴ See Andrew Kull, *Defenses to Restitution: The Bona Fide Creditor*, 81 B.U. L. Rev. 919 (2001). See generally *RESTATEMENT OF THE LAW OF RESTITUTION AND UNJUST ENRICHMENT* (Tentative Draft No.1, April 6, 2001) (Reporter Professor Andrew Kull).

²⁵ See, e.g., *Complaint and Jury Trial Demand at 8, Farmer-Paellman* (No. CV 02-1862) (discussing Rhode Island businessman John Brown, who was prosecuted for violating federal law by participating in the slave trade after it had become illegal).

²⁶ For theoretical justifications of retroactive law application in the slavery context, see Hanoch Dagan, *Restitution and Slavery*, 84 BU Law Rev. (forthcoming 2004). Dagan draws partly on economic theories presented by Louis Kaplow and, more recently, Kyle Logue. See Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 Harv. L. Rev. 509 (1986); Kyle D. Logue, *Tax Transitions, Opportunistic Retroactivity, and the Benefits of Government Precommitment*, 94 Mich. L. Rev. 1129 (1996). The argument coming from these works is, roughly, that a flat prohibition of retractive application is itself inefficient, and that law should be retroactively applied where the threat of such application encourages socially desirable incentives (e.g., to invest in productive resources). These arguments are difficult to object to, stated in these terms. However, the general problem in this area is coming up with a limiting principle for retroactive application. I have attempted to do that here.

principle is suggested by the special legal status that the institution claimed for itself. We have to reject the notion that anything we would wish to call law would ever sanction such an institution. For the institution is founded on the absence of law.²⁷ The institution itself claims to be one which has struck a deal in which the state agrees to stay out, and let the slaveholder define the law that governs his relationship with the slave.

It is entirely reasonable for the state to say that it never cut such a deal with anyone or any institution. As Smith noted, no other institution or relationship has ever claimed to have such a perpetual status under the law. The family is not exempt from regulation and has not been viewed as exempt since the earliest period of Roman law.²⁸ No corporation was ever held to have such a relationship with its customers or employees.²⁹ English common law, according to Blackstone, rejects any claim of an enforceable contract in which one party relinquishes all of his legal rights to another.³⁰

Slavery should be treated not as an institution sanctioned by the law, but as a corruption or displacement of law. Law and slavery are, in essence, “universal complements,” in the sense that one can exist only in a space in which the other is absent. Hence, the only morally consistent position that a state can take with respect to slavery is

²⁷ Indeed, one southern court came close to saying this. One contemporary summary of the laws of slavery notes the following: “The doctrine of *South Carolina* is equally strong. It is concentrated by *Wardlaw, J.*, in this single sentence: -- ‘Every endeavor to extend to a slave positive rights is an attempt to reconcile inherent contradictions; *for, in the very nature of things, he is subject to DESPOTISM.*’ *Ex parte Boyleton*, 2 *Strobhart*, 41.” George M. Stroud, *A Sketch of the Laws Relating to Slavery in the Several States of the United States of America* 10 (New York: Negro Universities Press, 1968)(1856).

²⁸ See William Blackstone, *Commentaries* *440-42 (discussing evolution of legal constraints in parent-child relationship from Roman to English law). Blackstone notes that “[t]he antient Roman laws gave the father a power of life and death over his children; upon this principle, that he who gave had also the power of taking away ... The power of a parent by our English laws is much more moderate.” *Id.* at 440.

²⁹ Perhaps the closest the law has come toward recognizing such a relationship is found in assumption of risk doctrine. However, assumption of risk doctrine has been construed narrowly, requiring a close fit between the implied consent and the victim’s knowledge of the risk he faced before injury. See William L. Prosser, *Handbook of the Law of Torts* 447 (1971). Assumption of risk doctrine has never given corporations a legal ground to claim a general immunity from legal claims by employees or customers.

³⁰ 1 William Blackstone, *Commentaries* *412 (discussing non-enforcement of contract for slavery) and *410-20 (discussing employment relationship generally).

that it has never cohabited with the institution. Moreover, this position works as a limiting principle on legal revisionism, because slavery is the only institution that claims to have had such a relationship with the state.

The correct model for slavery-based lawsuits is not one of a change in the degree of regulation, from a loose regulatory regime to a stricter one. This view would tend to support arguments against retroactive application of modern law. The appropriate model is one in which warlords have displaced the state and held it at bay while they imposed their own law on their subjected populations. When the state becomes strong enough to displace the warlords, it has no moral duty to respect the warlord's law.

In addition to the argument that slavery was well within the law, the slaveholder would also point out that the institution may not have been as harmful as many have asserted. Smith's description of Roman slavery certainly gives one the impression that slaves were commonly abused. He offers no statistics on abuse, just a few striking examples.

We are told that Augustus once manumitted all of the slaves of Vedius Pollio with whom he supped. A slave bringing in a dish happened to break it. The slave fell at Augustus feet and requested him, not to get his pardon of his master, for death he thought was inevitable, but that he would request his master that after he was crucified, which was the common punishment inflicted on slaves, he should not hack his body into pieces and throw it to feed the fish in his ponds, which was it seems his common way of treating them...³¹

Nothing was more common then to turn out the old and diseased slaves to die, as we would a dying horse. Cato, who was a man of the most severe virtue and the strictest observer of morall rules then in fashion, used frequently to do this and confessed it without any shame; and this he would not have done if it had been contrary to the practice of the times. In the same manner as it is common near a great city to have a place where they put dying cattle, so there was an island in the Tiber into which they

³¹ Smith at 177.

used to turn the slaves who were about to dye, and we are told it was white all over with their bones.³²

The treatment was apparently not as bad for slaves in the South.³³ Stamppp recounts many stories of cruelty, but none as disturbing as these pieces from Smith.

The American slaveholders' defense to these charges is that the institution was not as cruel as Smith's description would lead one to believe. Some slaveholders would take the position that the institution was not cruel at all, brandishing copies of Fogel and Engerman's *Time on the Cross* as support.³⁴ The Fogel and Engerman book uses statistics to paint an idyllic picture of the institution.³⁵ If Fogel and Engerman are correct, slavery's victims would be unable to prove that they suffered substantial damages.

Fogel and Engerman treat slavery as an economically efficient institution. Sure, they say, slaves were whipped, beat, and overworked. But so were free laborers as well. The central issue, in their view, is whether slaveholders applied an economically inefficient level of abuse to their slaves. The slaves were valuable property to the

³² Id. at 181.

³³ Even Frederick Douglass's autobiography, which is filled with stories of cruelty, does not include any account as bad as the "dish story" told by Smith. However, Douglass does say that his grandmother was essentially turned out to die. See Douglass Narrative, supra note 17, at 65-66 ("they took her to the woods, built her a little hut, put up a little mud-chimney, and then made her welcome to the privilege of supporting herself in perfect loneliness; thus virtually turning her out to die!")

³⁴ Robert William Fogel & Stanley L. Engerman, *Time on the Cross: The Economics of American Negro Slavery* (Little, Brown, 1974).

³⁵ In this sense, i.e., in presenting an optimistic and romanticized picture, Fogel and Engerman can be viewed as a return to the starting point of American historical scholarship on slavery, which is represented by Ulrich B. Phillips, *American Negro Slavery: A Survey of the Supply, Employment and Control of Negro Labor as Determined by the Plantation Regime* (New York: D. Appleton, 1918). Phillips's account was based on two fundamental notions: "idyllism," or the description of slavery as a gentle, developmental regime; and racism, or the description of slavery as being consistent with or appropriate given an assumed inferiority of African Americans. Much of the modern slavery scholarship attacks both premises. Though Fogel and Engerman differ from the modern scholarship by seeming to support the idyllic representation, they emphatically reject Phillips's view of the character of African American slaves. See, e.g., Fogel and Engerman, at 223-32 (one of several passages in book rejecting theories of innate inferiority as an explanation or justification of slavery).

slaveholders.³⁶ The optimal amount of force is not the amount that would have left slaves near death from exhaustion, or unable to work into their middle ages.³⁷ The optimal policy would aim to maximize the value of the slave's work over his life. Force might be necessary in this regime, but it would be used to the point at which its marginal benefit is just equal to its marginal cost. Fogel and Engerman conclude that the evidence is closer to the efficiency theory.³⁸ In perhaps the most significant challenge to the economic critics of slavery, Fogel and Engerman argue that the institution was *more efficient*, by a margin of roughly one third, than farms worked by free labor.³⁹

There have been attempts to challenge the statistical evidence on abuse used by Fogel and Engerman.⁴⁰ I am not aware of any consensus view on the statistical evidence; it appears to remain a controversy, perhaps one that will never be resolved. Stamp, in important respects, fully anticipated Fogel and Engerman's arguments. He was keen to note in his description of abuses that they were not the primary method of managing slaves.⁴¹ Stamp explained that slaveholders had incentives to manage their property carefully, to make the most productive use of it.⁴² Still, in Stamp's view, this offered no basis for excusing or downplaying the torts that did occur.

Smith also anticipated Fogel and Engerman's arguments. He explained that the frequency of abuse would depend on the nature of the slavery regime. Where slaves were a small proportion of the population, and the owners were relatively modest in wealth,

³⁶ Fogel and Engerman, 73-5.

³⁷ Id. 144-50.

³⁸ Id.

³⁹ Id. at 191-209.

⁴⁰ Herbert G. Guttman, *Slavery and the Numbers Game: A Critique of Time on the Cross* (1975); Paul A. David, et al., *Reckoning with Slavery: A Critical Study in the Quantitative History of American Negro Slavery* (New York: Oxford University Press, 1976).

⁴¹ Stamp at 178.

⁴² Id. 179, 279-80.

they would be treated moderately according to Smith.⁴³ The reason is that the slaves would tend to work and live closely with the owner under these conditions, and a relationship of reciprocity would develop over time.⁴⁴ Where slaves are large as a proportion of the population, Smith observed, things would be different.⁴⁵ The slaveholders would be in constant fear of insurrection and would need the threat of violent force to control this risk.⁴⁶ This would make abuse a common feature of the system.⁴⁷ Moreover, the fact that slaveholders had economic incentives to maximize the value of their property would not give us any reason to believe that the use of force was

⁴³ Smith at 184.

⁴⁴ Id. at 182-83. Stamp's discussion of small farms, and the need for farm owners to pitch in with hard work, is consistent with Smith's generalization, see Stamp at 35.

⁴⁵ Smith at 185. Smith appears to have a simple model of the incentives governing the treatment of slaves. Under his model, cruelty is largely a function of the wealth disparity between the top and bottom classes, or, equivalently, the size of slave farms. Although Smith uses the model effectively to explain the differences in cruelty levels across slave regimes, see id. at 184-85, it appears to be too simple in retrospect. In particular, Smith's model leaves out one very important factor in explaining the treatment of slaves: the degree to which slaves are integrated within the general labor market. Full integration means that slaves can gain or purchase their freedom relatively easily, and even the purchase and sale of slaves should be considered as evidence of some integration (though to a small degree). Peter Temin argues that slaves in ancient Rome were highly integrated within the general labor market, especially those living in cities. Peter Temin, *The Labor Supply of the Early Roman Empire*, Working Paper No. 01-46, MIT Department of Economics Working Paper Series (November 2001), available at http://papers.ssrn.com/paper.taf?abstract_id=293397. Temin argues that the high degree of integration, coupled with the greater prospect of attaining freedom, made early Roman slavery a relatively mild regime in comparison to American slavery. If Temin is limiting himself to early Rome (which he never makes clear in the paper), then it is easy to reconcile his explanation with Smith's description, since Smith focuses on slavery in the Roman countryside during the empire's later period. If one were to describe a general model of cruelty in slave regimes, it would depend on two variables: (1) the disparity in wealth between slaves and owners and (2) the degree to which slaves are integrated in the general labor market. Roman slaves living in cities appear to have been highly integrated. African American slaves were, in comparison, not well integrated. The lowest level of integration is observed in the Nazi concentration camps and the Soviet gulag system.

⁴⁶ Id. at 182-83.

⁴⁷ I should include within this description of abuse a startling type of systemic neglect that appeared as a byproduct of the large farm systems observed in ancient Rome and in the sugar-producing Caribbean colonies. Under both systems, slaves were brought over to do heavy labor, which led to a demand primarily for male slaves. Smith at 193. The small proportion of female slaves made it impossible for these slave populations to reproduce on their own, and also led to family instability and child neglect. Id. Since it was costly to raise a worker rather than grab one full grown, the slaveholders had no incentive to accommodate or support slave families. New slaves were introduced by continually imprisoning a steady flow of male laborers from other countries. Smith's observations are confirmed by Fogel and Engerman's comparison of the natural growth (i.e., excluding imports) of slave populations in America and in the Caribbean. While the birth rate exceeded the death rate for slaves in the South, the incumbent population of slaves declined by 2 to 5 percent per year in the Caribbean. Fogel and Engerman, at 25-6.

in any sense moderate. Where the threat of insurrection was high, the threat of violent force, verified by its frequent application, would have to be correspondingly high.

If one were to reconcile these arguments to create a statistical picture of the torts connected to slavery, one should presume, then, that the violent use of force was concentrated in the time periods and areas in which large slave farms were common. In the American South, the period and area in which large farms were common was the “Deep South” (roughly, around Georgia) during the half century before abolition.⁴⁸ Very large farms, an order of magnitude larger than those of the American South, were common in the British and French Caribbean, though these farms produced sugar rather than cotton and began in an earlier time period.⁴⁹ Slaves coming from these areas, and from the right time periods, should be granted a presumption to have suffered from physical violence. However, if Fogel and Engerman are right, such a presumption would not be appropriate for slaves held in other time periods or places (in America).⁵⁰ As far as conversion claims go, of course, all slaves should be presumed to have been victims. The same goes for claims based on false imprisonment.

Debates over the physical abusiveness of slavery, though important in determining whether slaves should be allowed to base their tort claims on such abuses, are probably beside the point in any overall assessment of tort claims arising from slavery or of the institution itself. Behind every cooperative relationship is a threat on the part of one party to impose a sanction on the other for refusing to comply with relational

⁴⁸ Fogel and Engerman, at 44; Stampp, at 31.

⁴⁹ Fogel and Engerman, at 22.

⁵⁰ However, Stanley Elkins’s discussion of slavery suggests a different view. Elkins argues that American slavery was unique in comparison to contemporary slave regimes (e.g., Brazil) in its degree of social and legal isolation of slaves, and its presumption of permanence. Elkins, *supra* note 12, at 63-78.

norms.⁵¹ The extent of cooperation depends in large part on the severity of the sanction and its likelihood of being imposed. The law puts heavy restraints on the sanctions an individual can impose on his neighbor for breaching norms of conduct. The law puts no such restraints on the slaveholder.

If the slaveholder seldom beat his slaves, what are we to make of this? Does it tell us, as Fogel and Engerman would have us believe, that the institution was not a brutal one? Or does it tell us that because of the threat of unregulated violence, the slave held his head down and did what he was told to do, no matter how disagreeable? I fail to see how evidence on its actual physical abusiveness could ever tell us much about the validity of tort claims based on slavery or about the real abusiveness of the institution. Evidence suggesting that whippings were infrequent is consistent with the claim that the institution was not physically abusive and equally consistent with the claim that the sanctions were so severe that slaves generally did not refuse masters. And if slaves did not refuse their masters because they feared punishment, then all that tells us is that they chose to be relatively unhappy many times rather than extremely unhappy a small number of times.

Smith noted that in addition to the obvious harms – physical injury, loss of property, loss of liberty – the slave also suffered less obvious, subtle injuries, many of which would appear to be actionable under tort doctrine. This second group of injuries might be labeled “social torts” in recognition of their affinity to what Orlando Patterson described as the slave’s “social death.”⁵² The most obvious of these is the inability to marry or to have a conventional marriage as most of us understand it today. In this

⁵¹ Oliver Wendell Holmes, Jr., *supra* note 8, at 44.

⁵² Orlando Patterson, *Slavery and Social Death: A Comparative Study* (1982).

respect the status of American slaves is no different from that of Roman slaves, which

Smith described as follows:

We are told that the male and female slaves lived together in contubernium, which is generally supposed to denote the same thing with regard to the slaves as matrimonium with regard to free persons. But it is very plain that there must have been a great difference. For no union betwixt them could have been of a long continuance from the very nature of the condition. First of all, that which creates the obligation to fidelity in the wife was altogether wanting when a male and female slave cohabited together. When a man takes a wife she comes to be altogether under his protection; she owes her safety and maintenance (especially in the lower ranks) entirely to her husband, and from this dependence it is that she is thought to be bound to be faithfull and constant to him. But a female slave who cohabits with the male one has no such obligation; she is not maintained by his labour, nor defended by him, nor any way supported; all this, as far as she enjoys it, she has from her master,... For this reason we see that the corrupting a female slave who lived in contubernio with a male one was not looked on as any way reprehensible or injurious. It was no injury to the master, nor was it any to the slave as he had no claim to her fidelity. ... Many other things render their cohabitation precarious. The duration of it does not depend on themselves but on their master. If he thinks that they do not labour so well together, he may send them to different parts of his farm, or he may sell either of them at his pleasure.⁵³

Stampp's description of American slavery gives us no reason to think that things were different for slave marriages in the South.⁵⁴ Fogel and Engerman, on this and many other issues, are keen to note that the slaveholder had incentives to keep slaves reasonably happy in order to maintain their productivity as workers.⁵⁵ They do not dwell on slave marriages, but the implications of their argument are clear. A slaveholder should, in their view, regulate marriage-related disputes, as slaves were permitted to marry, in order to bring order to relationships that were not recognized by law.

⁵³ Smith at 178-9.

⁵⁴ Stampp, 340-49. Even Smith's remark that the corrupting of a female slave was not looked on as injurious remained the law over the nearly two millennium stretch. Stampp notes that in Mississippi, the Supreme Court once dismissed an indictment brought against a male slave for raping a female slave on the ground that it was not an offense known to common or statute law. *Id.* at 347.

⁵⁵ Fogel and Engerman at 128.

Slaveholders should have had incentives to discourage infidelity and prostitution, and to recognize spousal and parental rights, as well as responsibilities, to the extent they did not interfere with their own management rights. These are plausible arguments, though in each case the practice would depend on the views and the capacity of the slaveholder to regulate marriage-like relationships. Even the most thoughtful slaveholder might find it too taxing to regulate the sex lives of slaves. And the central problem is that the institution hollows out the legal and material incentives that give stability to marriages, replacing them with the managerial hand of the slaveholder. Put another way, the institution strips property-like rights out of the marriage institution and replaces them with the cost-benefit calculus of the slaveholder.

The same observations apply to the relationship between parents and children. Both Stamp and Fogel and Engerman suggest that the separation of mothers from young children was relatively rare,⁵⁶ but the separation of fathers from children seems not to have been such a rare occurrence. As Fogel and Engerman note, the slaveholder's profit incentive would prevent him from being quick to sell off fathers who had small children, as this would hurt morale.⁵⁷ But slaves, particularly male ones, were often separated from their families for reasons the slaveholder could not control – for example, to pay off a debt.⁵⁸ While there are no statistics on the frequency of such separations, they occurred frequently enough to become a major spur to the abolitionists and a sufficient reason for many to see an end to the institution. The story of the male slave sold away from his family was an important part of the appeal of *Uncle Tom's Cabin* and of one of the most

⁵⁶ Fogel & Engerman 49-50, 143-44. Stamp takes no clear position on the relative frequency with which mothers were separated from children (in comparison to fathers), but notes that it was common for mother and children to be considered a family unit without reference to the father. Stamp at 344.

⁵⁷ Fogel & Engerman at 127-9.

⁵⁸ Stamp at 199-200.

popular American songs of all time, Steven Foster's *My Old Kentucky Home*. The first verse of Foster's song is a concise and moving story of the breakup.⁵⁹

The sun shines bright in the old Kentucky home,
 'Tis summer, the darkies are gay,
 The corn top's ripe and the meadow's in the bloom
 While the birds make music all the day.
 The young folks roll on the little cabin floor,
 All merry, all happy, and bright:
 By'n by Hard Times comes a-knocking at the door,
 Then my old Kentucky Home, good night.⁶⁰

Thus, the slave marriage was always precarious and uncertain. The male slave's relationship with his own children was in the same sense precarious. The stability of these relationships depended on the cost-benefit calculus of the slaveholder. Smith suggests that the same material incentives that held marriages together then (and to a lesser extent now) were also important in the relationship between father and child.

Tho he be satisfied that they were begotten by him, he knows too that they were not supported nor maintained by him, nor any way protected, which as I said before is that which alone constitutes the parentall and filial affections.⁶¹

The children would soon learn that they were not maintained or protected by either the father or the mother. Stamppp gives the example of a child on a Louisiana farm who saw

⁵⁹ "My Old Kentucky Home," in a sanitized version, is both the state song of Kentucky and sung at the opening every year of the Kentucky Derby horse race. Most of those who sing it today have not the slightest idea that it is about the breakup of a slave family. Most probably think that it has something to do with the Kentucky Derby, or with a worker having to leave Kentucky to take a job somewhere else. The music itself has a beautiful sadness to it that would lead one to think that it must be about something sad. But the connection to slavery, and lyrics describing quiet acquiescence in an oppressive regime, are lost on most who hear the song today. A cynic might describe the adoptions of the sanitized version as conspiratorial efforts to impose a collective amnesia.

⁶⁰ For the full original version of the lyrics, see, e.g., <http://users.erols.com/kfraser/music/ky-home.html> (visited on June 24, 2002).

⁶¹ Smith at 179.

his mother receive twenty-five lashes for countermanding an order his mistress had given him.⁶²

The destruction of property-like expectations or equivalently the socialization of the slave marriage is predictably a recipe for disaster. The relatively low probability that the family unit would remain intact should have weakened incentives to invest in the marriage relationship – i.e., to forgo some immediate gain today in order to preserve the relationship – or to invest in children by taking responsibility for their education and moral development. Smith claimed that as a result, prostitution was common among female Roman slaves and in his day was a common feature of slavery in the West Indian colonies.⁶³ Stamp describes sexual promiscuity and neglect of children as serious problems under slavery in the South.⁶⁴ Fogel and Engerman try to counter these claims, but fail in the end to provide the detailed statistical evidence characteristic of their approach to other controversial issues.⁶⁵ The lack of good statistical evidence makes it hard to determine the depth or extent of the family instability problem, and probably few useful data sources if any exist. However, some have claimed that the much-discussed weakness of the African-American family unit, identified as a reason for alarm in the 1960s by the Moynihan report,⁶⁶ can be traced to incentives created under slavery.⁶⁷

In addition to the socialization of marriage, another significant social tort inflicted on slaves was the denial of religious freedom – or, as Smith says, the denial to the slaves

⁶² Stamp at 343.

⁶³ Smith at 179.

⁶⁴ Stamp at 345-48.

⁶⁵ Fogel and Engerman, 135-38.

⁶⁶ Daniel P. Moynihan, U.S. Department of Labor, *The Negro Family: The Case for National Action* (1965).

⁶⁷ James Q. Wilson, *The Marriage Problem: How Our Culture Has Weakened Families* 126-29 (2002).

of their own god.⁶⁸ The Roman slaves were excluded from official religious societies and were deemed “profane.”⁶⁹ African American slaves suffered a similar treatment in terms of exclusion. Initially, American slaveholders justified their institution on the ground that the slaves were not Christian,⁷⁰ and given their status could be enslaved without any moral concerns. To ensure that slaves remained in their profane status, colonial legislatures prohibited baptism of slaves.⁷¹ Eventually the religious barrier gave way, as slaves were baptized and some Christians were enslaved, and profanity came to be defined by race.⁷² African American slaves were then no longer excluded from the Christian religion but they were not allowed to practice it in an unregulated manner. State slave codes required the presence of overseers at gatherings of slaves,⁷³ and any reasonably intelligent slaveholder would have made sure to be present at any religious ceremony held by slaves. For if the slaveholder or his representative were not present, the slave’s god, speaking through earthly ministers, would have talked at length about perceived evils of the institution, encouraging insurrection. But in the presence of the slaveholder, slave religion could do little more than encourage acceptance and acquiescence.

Smith’s description of the turning out and leaving to die of old and diseased slaves in ancient Rome appears in his description of hardships which are not “commonly

⁶⁸ Smith at 179.

⁶⁹ Id.

⁷⁰ See, e.g., George M. Frederickson, *Racism: A Short History* 31 (2002).

⁷¹ See, e.g., Kevin Mumford, *After Hugh: Statutory Race Segregation in Colonial America, 1630-1725*, 43 *Am. J. Legal Hist.* 280, 284 (1999). However, most historical accounts stress the reluctance of individual slaveholders, rather than laws, as the reason slaveholders tried to ensure that their slaves would not be baptized. See Albert J. Raboteau, *Slave Religion: The Invisible Institution in the Antebellum South* 98 (1978).

⁷² See, e.g., Frederickson, *supra* note 66, at 45; Elkins, *supra* note 12, at 50.

⁷³ Stamp, at 208. In particular, it was against the law for a slave to preach to a group of fellow slaves without his master being present.

taken notice of by writers,”⁷⁴ a category that I have relabeled as social torts. If one were to generalize, the Roman treatment of old or diseased slaves could be described as an example of a general status deprivation, or defaming based on status. Slaves in the South do not appear to have been turned out to die, but they received a far different treatment at death than whites. Slave burials took place at night, so that they would not interfere with work.⁷⁵ Accidents that resulted in the deaths of slaves were typically described as investment losses to the slaveholders.⁷⁶ These examples are sufficient to suggest that status deprivation was also a significant part of the South’s slave regime. Although Fogel and Engerman report that slaves developed marketable skills and moved into managerial positions on slave farms,⁷⁷ these achievements would be lessened in status by the fact that the slaveholder would always be able to say, and the slave always knew, that the skills were developed only by the slaveholder’s grace.

The question generated by these social torts is whether and how they could form part of a claim for damages. The socialization of marriage could be analogized to a claim for “loss of consortium” or destruction of marital services, which is a compensable tort. Surely, for marriages that had been broken up by the slaveholder, the claim would be valid. But the standard tort categories appear to be inadequate for many of the injuries connected to the social torts. We have a case in which the victims were thrown by the defendants into a regime in which their own incentives led them to take actions that produced new injuries. It is entirely plausible that slave marriages, rigged so that the incentives of each party would encourage putting short term gain ahead of long term

⁷⁴ Smith at 178.

⁷⁵ See, e.g., Eugene D. Genovese, Roll, Jordan, Roll: The World the Slaves Made 197 (First Vintage Books Edition 1976); <http://www.sciway.net/afam/slavery/burials.html> (visited June 30, 2002)

⁷⁶ Stamp, at 204.

⁷⁷ Fogel and Engerman, 38-43.

investment, produced some of the most serious injuries.⁷⁸ Yet, conventional tort doctrine would seem to deny liability on the part of the slaveholder for the injuries connected to this incentive structure.

For example, consider the precariousness of the slave marriage. The institution replaced the property-like expectations of conventional marriage with the slaveholder's evaluation of what is reasonable. The slave couple would have to know, under this regime, that their marriage could be brought to an end at any moment, depending on the needs or desires of the slaveholder. It is a standard result of game theory that short horizons encourage cheating in cooperative relationships.⁷⁹ Knowing that the "game" could come to an end at any time, each party has little reason to forgo an uncooperative "deviation" in order to preserve the relationship for the long term. Thus, precariousness by itself encourages conduct that undermines stable relationships. Where the incentive to cheat is strong, because the risk of involuntary break up is significant, both parties to the marriage would have incentives to cheat, leading to the standard result of the Prisoner's Dilemma in which the welfare of both parties is below the level they would have achieved had they cooperated. But it is unlikely that any court would permit someone to collect damages for the harms brought about because incentives to cooperate were poor.

⁷⁸ There is some empirical evidence suggesting that the slave marriage may have been the most significant harm in terms of the duration of its effects. Examining Census records from 1920, Bruce Sacerdote finds that the grandchildren of slaves had caught up to those of free blacks in terms of literacy and income. The key difference between the two groups was in the likelihood of being in a female-headed household. See Bruce Sacerdote, *Slavery and the Intergenerational Transmission of Human Capital*, Working Paper 9227, NBER Working Paper Series, National Bureau of Economic Research, September 2002, available at <http://www.nber.org/papers/w9227>. Assuming the likelihood of being in a female-headed household is correlated with the family stability disincentives under slavery, Sacerdote's results can be interpreted as evidence of the significant cross-generational effect of the slave marriage.

⁷⁹ To be precise, the "cheat" or "defect" strategy is the equilibrium in any finitely iterated Prisoner's Dilemma. See, e.g., Luce & Raiffa, *supra* note 14, at 97-102.

Unlike the standard loss of consortium claim, the slave spouse, in the case of a slave marriage that has not been broken up by the slaveholder, has not been denied the society, services, or capacity for sexual intercourse with his or her mate. Instead, the institution strips out the expectation of stability and the fundamental material obligations of marriage. To some this might seem to be a boon: sex without obligations. But it is likely to have been at least as harmful over the long term as the type of injury that leads to a tort claim for loss of consortium. Indeed, this appears to be a classic example in which the shortening of horizons caused by the weakening of a property right produces the potential for a short-term gain coupled with a much larger long-term loss.⁸⁰ Ulysses, untied from the mast, would have to rely on his wits to choose the proper course of action.

As another example, consider the fact that the male was “relieved” of the responsibility to provide for and defend his wife and children. A court might view this as a benefit rather than an injury, since many parents would consider it a relief to discover that they did not have to pay for their child’s food or clothing. But along with this relief comes a denial of responsibility for these fundamental aspects of parenthood, as well as a denial of the right of control over many aspects of the child’s raising. To this we should add the precariousness mentioned before; at any time the male could be separated. Few parents would voluntarily accept this tradeoff. But how would you evaluate the damages, and is there a standard claim to which this injury could be analogized?

⁸⁰ The traditional example is the obvious one in which the abolition of property rights leads to a struggle among neighbors to expropriate each other’s property. While the short run incentive to expropriate is strong, everyone (or just about everyone) loses in the long run under this regime. Another way of describing this problem is that the shortening of horizons caused by the weakening of a property right generates “time-inconsistent” preferences. On the general time-inconsistency problem, see Robert H. Strotz, Myopia and Inconsistency in Dynamic Utility Maximization, 23 Rev. Econ. Stud. 165 (1955-1956).

The other substantial social tort, exclusion from religious freedom, seems equally hard to shoehorn into a claim for damages under tort law. It is a substantial harm nonetheless. As Smith notes, the demand for religion increases with the harshness and uncertainty of life.⁸¹ Slavery – whether in ancient Rome, the American South, or wherever – creates a social structure in which those whose lives are most uncertain and harsh are the ones denied religious freedom. Religious freedom is greatest in these regimes for the wealthy, who have the least need or desire for it.

I have so far restricted this discussion to private harms, harms that could potentially be addressed through the tort system. I have not talked about wider social harms, the ways in which slavery created a social order that left both slave and slaveholder populations worse off. As I said before, the institution can be analogized to the Prisoner's Dilemma in sequential form. The slaveholder's initial decision to enslave sets in play a series of actions that lead to large losses in society's welfare.

Smith pointed to three significant social costs of slavery. One is its tendency to turn democracies into oppressive and unstable governments.⁸² Under monarchy, Smith argued, the king and people in the lower ranks will often find their interests aligned against the class of wealthy landowners. The king is most afraid of the landowner class because they have control over substantial resources that can be used to check his power. In order to constrain the landowners, the king will have incentives at times to expand the freedoms of the lower ranks, which Smith argued was the general trend that led to the demise of slavery in Europe.⁸³ Under democracy, however, and especially the system in ancient Rome, the landowner class will always vote to maintain their control over slaves.

⁸¹ Smith at 179.

⁸² Smith at 181-82.

⁸³ Id. at 187-88.

They will vote against every proposed constitutional change that might weaken their control over slaves. And they will vote in favor of oppressive laws that secure their safety and control over slaves. The general fear of slaves will lead them to support corrupt law enforcement regimes that target the slave class rather than targeting criminal conduct in general.⁸⁴ The paradoxical result is that democracy, usually an institution thought to be conducive to the spread of liberty, becomes a rigid barrier to the extension of freedom under slavery. To the extent this characteristic of slavery impedes the spread of democracy or contributes to its instability, this has to be counted as a significant cost.

The second social cost, again in the nature of a paradox, is that slavery makes the attainment of wealth potentially harmful to others by increasing the external costs of wealth acquisition. In a free market, Smith argued, the entrepreneur provides external benefits to others by moving resources to more productive uses, expanding employment and consumption.⁸⁵ Under slavery, the entrepreneur who improves his position, bottles up the transmission of wealth by hiring an ever larger pool of slaves to take over production that would otherwise be farmed out to free laborers.⁸⁶ And along with large slave holdings comes the greater need to oppress the slaves in order to secure their obedience.

The third social cost, related to the second, is that society's wealth is lower under slavery than under a regime in which the same individuals are employed as free laborers.

This is because

⁸⁴ On the social costs of targeted law enforcement, see Keith N. Hylton & Vic Khanna, *Toward an Economic Theory of Criminal Procedure*, BU Working Paper No. ___, <http://www.bu.edu/law/faculty/papers>.

⁸⁵ Smith at 195.

⁸⁶ Id. at 194-96.

the cultivation of land by slaves is not so advantageous as by free tenents; that the advantage gained by the labours of the slaves, if we deduce their originall cost and the expense of their maintenance, will not be as great as that which is gaind from free tenents. In the antient governments where slaves were the sole cultivators of the land the method was to assign them a piece of ground to cultivate, all the produce of which belong'd to their master, except what he allowed to them for their maintenance. We find that this part which was over that which was necessary for the maintenance of the cultivators in the fruitfull countries of Greece and Italy was about 1/6 part of the produce, whereas in Scotland and England where the rents are high the tenent pays 1/3 part for rent. The cultivation of the land of Greece and Italy must evidently from thence have been very bad, when they produced only 1/6 part more than was necessary to maintain the cultivators, altho the soil be exceedingly fruitfull and the climate very favourable; whereas the barren and cold countries of Scot. and Eng. afford 2ce as much to the landlord...⁸⁷

This is good historical evidence of the inefficiency of slavery. The reason for the inefficiency is that

the slave or villain who cultivated the land cultivated it entirely for his master; whatever it produced over and above his maintenance belonged to the landlord; he had therefore no inducement to be at any great expense or trouble in manuring or tilling the land; if he made produce what was sufficient for his own maintenance this was all that he was anxious about. The overseer perhaps by a hearty drubbing or other hard usage might make him exert himself a little farther, so as to produce from the farm a small portion for the landlord; but this would not be very great...⁸⁸

Smith's account stands in contrast to that of Fogel and Engerman, who claim to show that slave farms were roughly one third more efficient than free farms.⁸⁹ However, Fogel and Engerman also show that the large farms in the South were almost exclusively slave operated and that these farms were able to take advantage of scale economies, which are significant in agriculture.⁹⁰ Although Fogel and Engerman claim that scale

⁸⁷ Id. at 185

⁸⁸ Id. at 185-86.

⁸⁹ Fogel and Engerman, at 191-209.

⁹⁰ Id. at 194.

economies do not account for the entire efficiency advantage of slave farms,⁹¹ their argument in support of this claim suggests the opposite. In particular, three significant weaknesses stand out. First, they concede that there were no large-scale farms based on free labor,⁹² which would seem to make it virtually impossible to separate the portion of the slave-farm efficiency advantage due to slavery from that due to large-scale operation. Second, they concede that they did not estimate economies in distribution, only economies in production.⁹³ Third, their explanation of the slave-farm efficiency advantage emphasizes the distribution economies introduced by the steamboat in the 1820s and developments in management methods,⁹⁴ neither of which suggest any particular advantage of slave relative to free labor. However, steamboat diffusion and better management techniques should have contributed greatly to the realization of scale economies, and given this, their argument can be interpreted as support for the claim that the entire slave farm efficiency advantage resulted from scale economies.⁹⁵ In addition to these weaknesses, Fogel and Engerman's evidence of a low rate of slave labor

⁹¹ Id. at 192-94.

⁹² Id. at 194.

⁹³ Id.

⁹⁴ Id. at 199-209. Only one of Fogel and Engerman's claims seems to suggest that there was something special about the efficiency of slave labor. Fogel and Engerman note, quoting one observer of the time, that slaves could be "driven" in a way that free workers could not. Id. at 205. One could view this as another example of the benefits of scale economies – that with large production teams, a manager could mechanize the process of physical labor. On the other hand, perhaps Fogel and Engerman mean to say that slave labor has a special quality that makes it ideal for being driven. If this is true, one has to wonder what the source of this quality could be. Could it be that men are induced to work harder by the crack of the whip than by the lure of extra pay? More precisely, could it be that the extra pay necessary to make a farm hand work long hours in the hot sun was simply beyond the means of Southern farmers, and this forced them to rely on the whip in order to produce a large quantity at a cost that would at least allow them to break even? If this is the explanation for the "efficiency" of slave labor, then it should be clear that slave labor was not efficient in the standard sense of the term. Such a theory of "efficiency" would lead one to argue that an accomplished art thief is an "efficient" producer of works of art.

⁹⁵ Donald F. Schaefer and Mark D. Schmitz, *The Relative Efficiency of Slave Agriculture: A Comment*, 69 *Am. Econ. Rev.* 208-12 (1979).

expropriation⁹⁶ seems to contradict their efficiency thesis and to support Smith's view that the institution is inferior in its capacity for motivating productive effort.

Even if Fogel and Engerman were to find virtually incontrovertible statistical support for the claim that southern slave labor was more efficient than free labor,⁹⁷ after separating out the part of the slave farm efficiency advantage due to scale economies, I would still find the claim hard to believe. It flies in the face of too much concrete historical evidence. The flaw in slavery as an economic system is that it replaces profit-seeking as a motivation for effort with the command and control of the slaveholder. In this sense, slavery belongs in the same class as feudalism and communism as an economic system. Anyone who takes a short look at comparisons between agriculture in communist and free market systems will see striking evidence of the inefficiency of command-and-control. Consider, for example, agriculture in the U.S. and in the Soviet Union (before its breakup). Or, compare agriculture in South Korea to that in North Korea; Taiwan versus China (pre-1978), Hong Kong versus China, Florida versus Cuba.⁹⁸

⁹⁶ Id. at 153.

⁹⁷ For econometric critiques of the Fogel and Engerman argument, see Thomas Haskell, *Explaining the Relative Efficiency of Slave Agriculture in the Antebellum South: A Reply to Fogel-Engerman*, 69 *Am. Econ. Rev.* 206-7 (1979); Paul A. David and Peter Temin, *Explaining the Relative Efficiency of Slave Agriculture in the Antebellum South: A Comment*, 69 *Am. Econ. Rev.* 211-12 (1979).

⁹⁸ Obviously there is a big difference between the relative efficiency of agriculture in the pre-1990 Soviet Union and in America, on one hand, and the North and South during the period of American slavery, on the other hand. The slave system in the South was not clearly less efficient than the North, if one merely compares levels of agricultural productivity, see Fogel and Engerman, at 194. But, as I noted above, this comparison is obscured the existence of much larger farms in the South. My claim here is that command-and-control systems have shown themselves to be inferior to market-based systems. Slavery in the South was not a thorough command and control system. In every way save the master-slave relationship, the South operated under a market-based system. However, the master-slave relationship is one piece of the system in the South that operated under command-and-control principles. If large free farms existed, in competition with the large slave farms of the South, history suggests that the free farms would have prevailed eventually.

There is a fourth social cost that should be added to Smith's list, one that was not obvious at the time Smith was writing but is all too obvious today. American slavery, unlike Roman slavery, contributed greatly to the spread and resilience of racism. Slavery gave racist attitudes an economic function that would otherwise not have existed. First, the propagation of racist beliefs served the dominant slaveholding class by reducing the likelihood that bonds would form between poor whites and slaves,⁹⁹ whose economic interests were in many respects perfectly aligned. Slavery depressed the wages of free laborers and limited their work opportunities. A wealthy landowner had no need to hire free laborers to build a structure or to make furniture when he could assign his slaves to do the work. If the landowner class could convince the class of poor white laborers that holding African Americans in slavery was in some sense consistent with the natural order, an order which put them on a higher level than slaves, it could forestall or possibly prevent the buildup of political pressure to abolish slavery. And since people are by nature status seeking, racist attitudes offered poor whites a sense of comfort and superiority that made them less willing to challenge existing institutions. Second, racism

⁹⁹ See David Lyons, *Unfinished Business: Racial Junctures in US History and Their Legacy*, BU Working Paper, at 12. Slaveholders feared that if bonds formed between poor whites and slaves, poor whites, who were in the majority, might legislatively overturn the slave regime – or, even worse, the two groups might join together to violently overthrow the regime. Examples of the latter are Bacon's Rebellion of 1676, and Gabriel's Conspiracy of 1800. On Bacon's Rebellion, see Lyons at 12. On Gabriel's Conspiracy, which occurred in Virginia in August 1800, see <http://www.pbs.org/wgbh/aia/part3/3p1576.html> (visited August 19, 2002). The notion that racism served the purpose of the dominant class by preventing the formation of alliances between blacks and poor whites is suggested by C. Van Woodward's treatment of the history of Jim Crow. C. Vann Woodward, *The Strange Career of Jim Crow* 85-87 (2d ed. 1966) (discussing movement to disfranchise black voters). Woodward notes that the effort to disfranchise black voters led to the disfranchisement of many poor whites as well, though exceptions were designed to allow whites to vote. The promotion of racism served to discourage poor whites from blocking the poll tax and other disfranchisement tactics. For another account suggesting that racism may have served the purpose of preventing bonds from forming between poor whites and slaves, see Genovese, *supra* note 71, at 23 ("White men sometimes were linked to slave insurrectionary plots, and each such incident rekindled fears. By deciding that lower-class whites who associated with blacks were "degraded," the slaveholders explained away the existence of such racial contacts and avoided reflecting on the possibility of genuine sympathy across racial lines. They also upheld stern police measures against whites who illicitly fraternized with blacks, and justified a widespread attempt to keep white and black laborers apart.")

served an economic function by reducing the payoff to slaves from gaining freedom. In the presence of a thick social atmosphere of racism, many slaves must have rationally discounted the benefits of attaining freedom, which may explain the bizarre phenomenon of voluntary re-enslavement.¹⁰⁰ The third reason slavery gave racism an economic function is the need to deter slave insurrections. This need, as much present in ancient Rome as in the American South, justified the use of oppressive force on large farms and harsh law enforcement directed toward slaves. The propagation of racist beliefs served the purpose of making oppressive law enforcement policies, especially those aimed at slaves, acceptable to the general public.

Racism of the type generated from American slavery is socially costly. It is not simply a matter of people having tastes or beliefs, for which they eventually pay in a competitive market.¹⁰¹ Nor is it a matter, as some have proposed, of having statistical judgments based on experience,¹⁰² as might be expected if success in business depended on making good estimates of the behavior of others. The racism of southern slavery, propagated as a belief structure designed to help maintain a socially undesirable institution, has no basis in efficiency or even in free association and expression. In addition to helping support the institution of slavery, it produced violent attacks on African Americans during slavery and for several generations after its end.¹⁰³ Once racism is put in this context, it appears as a gross mistake to think that it has anything to

¹⁰⁰ See, e.g., Robert B. Shaw, *A Legal History of Slavery* 44 (1991).

¹⁰¹ I refer to the “taste-based discrimination” theory, see Gary S. Becker, *The Economics of Discrimination* 16-17 (2d ed. 1971).

¹⁰² I refer to the “statistical discrimination” theory, see Edmund S. Phelps, *The Statistical Theory of Racism and Sexism*, 62 *Am. Econ. Rev.* 287 (1972); Kenneth Arrow, *The Theory of Discrimination*, in *Discrimination in Labor Markets*, 3-33, Orley Ashenfelter and Albert Rees, eds., Princeton University Press, 1973.

¹⁰³ For a history of lynching, see Phillip Dray, *At the Hands of Persons Unknown: The Lynching of Black America* (2002).

do with people being free to associate with whomever they wish or to make efficient statistical predictions about the competence of potential employees or customers. And while this virulent form of racism remains in existence, statistical discrimination and the occasional discrimination that comes along with being free to choose your associates both become tainted by the ease with which the virulent form can mingle with them without being detected.

Like a resilient virus, racism has a tendency to replicate itself in successive generations. The racist belief structure promoted in order to justify the oppression of slavery replicates itself over time and is to some extent self-confirming. It replicates itself over time because the first generation within an agency such as a police force will tend to screen for applicants that hold the same views. They will do this because of the tendency to train according to methods that have been used in the past, and in order to avoid dissension within the agency. Thus, racism once embedded in an institution is likely to remain for several generations until it works itself out. In addition, the oppressive laws, wealth differentials, and status differentials remain after slavery's prohibition. The beneficiaries of these differentials have an incentive to continue to accept and even to promote racism as a belief structure in order to maintain their benefits, and this incentive should remain in successive generations. The beliefs are self-confirming to the extent that a racist law enforcement policy deters a greater percentage of law abiding African Americans from walking the street than of criminals.¹⁰⁴

Economic models of discrimination by Becker, Phelps, and Arrow have given us the categories of taste-based and statistical discrimination, where the former refers to

¹⁰⁴ On the boot-strapping nature of discriminatory beliefs generally, see Glenn Loury, *The Anatomy of Racial Inequality* (2002).

discrimination based on preferences and the latter to discrimination based on rational predictions.¹⁰⁵ This categorization has influenced other social scientists, especially economists, to study these types of discrimination under the belief that these categories encompass every conceivable type. However, the type of racism generated by slavery in the South is arguably different from both taste-based and statistical discrimination. Taste-based discrimination is a competitive disadvantage to its practitioners, and competition tends to punish them over the long term. Statistical discrimination is a competitive advantage to the extent its practitioners are accurate and a competitive disadvantage to the extent they are mistaken. However, the oppressive or virulent racism generated by slavery is tautologically an advantage because it is designed to maintain differences in wealth and status.¹⁰⁶

III. Derivative Claims

The *FleetBoston* complaint included a claim demanding compensation for conversion of the value of plaintiffs' ancestors' slave labor.¹⁰⁷ The conversion claim can be viewed as derivative in the sense that it is brought by descendants of victims rather than direct victims. This should be distinguished from the case of an heir, who can be

¹⁰⁵ *Supra* notes 97 and 98.

¹⁰⁶ Perhaps McAdams comes closest to this view in his description of racism as the result of status seeking. See Richard McAdams, Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination, 108 Harv. L. Rev. 1005 (1995). However, McAdams' theory is hard to distinguish from taste-based discrimination. It seems to be a version of taste-based discrimination. People have a taste for status, which leads them to discriminate. Under this theory, racism is a disadvantage in some settings. Under the view I propose in the text, racism is always an advantage, at least at its propagation sources. In a similar sense, Frederickson defines racism as the combination of "difference" based on immutable characteristics coupled with "power", see Frederickson, *supra* note 66, at 5-9. Frederickson tries to distinguish this notion of racism from that of personal tastes or xenophobia.

¹⁰⁷ Complaint and Jury Trial Demand at 17, Farmer-Paellman (No. CV 02-1862); Second Consolidated and Amended Complaint and Jury Trial Demand at 58-60, African American Slave Descendants Litigation (No. 02-7764).

considered a direct victim if someone steps in and takes the real property or savings of his parents the moment after their death. Reparations plaintiffs, however, are not in the same position as the heir cheated out of his inheritance. Their claims are quite a bit more distant, and hence better viewed as derivative rather than direct. Reparations plaintiffs are saying that if their ancestors had been paid the value of their surplus labor, beyond what was required to maintain them, that value would have been passed down to their descendants over several generations.

A. Tort Law and Derivative Claims

Tort law traditionally has been unreceptive to derivative claims. One famous case, *Moch Co. v. Rensselaer Water Co.*,¹⁰⁸ involved a warehouse that was burned down after the water company neglected to supply adequate water through its fire hydrant to put out the fire. The company had signed a contract with the city of Rensselaer to supply water for public use. The court held that the water company was not liable to the warehouse owner for its failure to supply adequate water because its duty extended only to the city. Although the court did not use the language of proximate cause or foreseeability the decision is equivalent to saying that the company's failure to supply adequate water was not a proximate or foreseeable cause of the plaintiff's injury.

Moch is one of several cases in which the court's use of the concept of proximate cause differs from the common sense usage. If a water company cuts off water to a fire hydrant while a nearby building is on fire, then to most of us it is perfectly foreseeable that an injury will follow. The decision in *Moch*, therefore, cannot be defended on an intuitive notion of foreseeability. The concept of proximate cause is being used in *Moch*

¹⁰⁸ 159 N.E. 896 (N.Y. 1928).

to screen out cases in which the court thinks there are good policy arguments for not holding the defendant liable.

Another example of tort law's stinginess toward derivative claims is *Ryan v. New York Central R. Co.*,¹⁰⁹ where the court considered the extent of a defendant's liability when it is responsible for a fire that burns down one home, and then spreads to burn down others. The court adopted a bright line rule holding the defendant liable for the first home and not for the others. Thus, if the defendant's negligently-caused fire burns down home A and then communicates to homes B, C, and all the way to Z, the defendant will be held liable only for burning down A. We can think of the fires communicated to B through Z as derivative harms. Again, nothing is more foreseeable on a common sense basis than that a fire set in one home, in a densely built neighborhood, may communicate to others. Still, the court avoided this intuition and restricted liability on the basis of the policy that such extensive liability would discourage legitimate activity.

Most relevant for reparations claims are the traditional rules governing the survival of tort claims. Prosser notes that there were three traditional rules: (1) the claim against the defendant did not survive the defendant's death, (2) the plaintiff's claim did not survive the plaintiff's death, (3) the survivors of the plaintiff could not bring damages for his death.¹¹⁰ The first two of these rules seem capable of being defended on common sense grounds. If the defendant dies, then why should the court allow you to sue someone else, like his wife? What good could come of that when the defendant's wife is not responsible in any way for your injury? Similarly, if the plaintiff dies, why should the court allow someone else to sue for *his* damages?

¹⁰⁹ 35 N.Y. 210 (1866).

¹¹⁰ W. Page Keeton, Dan B. Dobbs, Robert E. Keeton, David G. Owen, Prosser and Keeton on Torts 940 (5th ed. 1984).

It is the third rule, denying survivors the right to sue for the support of a family member killed by the defendant's negligence, that is hard to understand on common sense grounds. It would seem to be consistent with the deterrent aim of tort law, an aim recognized by some theorists as the dominant rationale by the late 1800s,¹¹¹ to require defendants to pay for the loss of support to dependent family members when a parent is killed. Indeed, it seems completely perverse to deny such claims, because it gives injurers an incentive to kill rather than merely injure their victims. Repeat player defendants such as railroads must have been aware, in the period before the legislative creation of wrongful death actions, that it was better from a financial perspective to have dead bodies strewn about an accident scene than injured bodies.

Why would early tort law reject a claim for wrongful death on the part of family members? The case law and commentary provide no clear explanation. However, the most likely reason can be discerned by comparing the wrongful death claim to the traditional tort claim. The traditional tort claim was brought by a plaintiff who had been injured by the defendant, seeking damages that would compensate and aim to restore him to the welfare level he had before the injury. It is easy in this case to see how the injury has hurt the plaintiff and to determine a compensating amount for objectively quantifiable injuries. For example, medical expenses incurred and wages the victim lost or would be unable to earn as a result of the injury are relatively easy to quantify.

In the wrongful death case, however, the damage claim is based on a counterfactual. The plaintiff is saying: if the deceased had continued to live, he would have continued to support me at such and such rate. This was too speculative for traditional courts. They did not want to entertain suits in which the plaintiff claimed that

¹¹¹ Oliver Wendell Holmes, Jr. *supra* note 7 (Lecture III)

the injured party would have paid her \$X per year if he had not been killed by the defendant's negligence. Although such claims are routine today, they are still speculative. Suppose the victim had earned \$50,000 per year. We have no way of knowing that he would have continued to earn as much or more. He might have decided to quit his job to take a lower paying job, or he may have been fired. Even if he had continued to earn the same amount, he might have decided not to hand all of it over in support to the spouse.¹¹²

The law regarding wrongful death claims has changed, due to statutes passed over the late 1880s and early 1900s in the American states.¹¹³ Now certain relatives of the deceased – usually husband, wife, parent, or child – can collect damages under the wrongful death statute.¹¹⁴ This has to be regarded as an improvement on deterrence grounds, since it lessens the incentive a potential tortfeasor, especially a repeat player like a railroad, would have to kill rather than merely injure its victim. On the other hand, wrongful death actions introduce a level of speculativeness in the proof of damages that was not part of traditional tort doctrine. The tradeoff involves the acceptance of a less accurate and more costly dispute resolution process in exchange for a potentially greater deterrent effect.

¹¹² Alfred Brophy reminded me that during the period in which courts denied wrongful death claims brought by survivors, they allowed slaveholders to obtain compensation for the negligent killing of a slave. Although this seems at first to be a puzzle or inconsistency, it is quite consistent with the traditional assumptions under which courts treated derivative claims. In the case of the slaveholder, courts operated under the assumption that he had a legal right to the income earned by the slave. At most, the slave had a right to the portion necessary for his maintenance. In the case of the surviving wife, however, she had no legal claim over the husband's income, given the law at the time. This difference suggests that courts awarded compensation to slave owners because their claims did not depend on the victim's (the slave's) willingness to hand money over to the plaintiff.

¹¹³ Prosser, *supra* note 18, at 902-903.

¹¹⁴ *Id.* at 904.

B. Reparations as a Derivative Claim

The reparations claims brought by descendants of slaves take the speculative quality of wrongful death actions to a new level. Consider, for example, the claim for uncompensated labor. This seems at first to be a contract breach claim, but the slaveholder never signed a contract with his slave to pay anything. For this reason I will continue to treat this as a claim for damages connected to the initial tort of wrongful confinement. To be sure, there is an equally if not more attractive claim for restitution based on unjust enrichment, but I will return to this later.

Like the wrongful death action, the reparations claim for unpaid wages asks the court to assume that the victim would have continued working and that he would have passed it on to dependents. It should not be considered a flaw in this theory, and a reason for reducing plaintiff's damages, that the slave, due to the precariousness of the relationship with his family, had weak incentives to pass his money on to his wife or his children. Precariousness would have given the slave a strong incentive to spend his money on his own desires right away. But the fact that there was always a hovering risk that he might be forced to leave his "Kentucky home" was not the slave's fault. This is simply part of the harm connected to the initial tort of confinement.

In order to avoid reducing damages to descendants for a reason that was not only beyond the slave's control but a foreseeable consequence of the initial injury, we should assume that if paid, he would have passed the money on at the same rate as parents in conventional families do. The problem that remains is the passage of time, which allows for many opportunities for money to be squandered or used in other ways. If we assume that the likelihood the average father will save all of the money he earns above what is

needed for his own maintenance and pass it on his children is eighty percent, which is probably generous,¹¹⁵ then a claim for unpaid wages by the first generation seems permissible. However, the likelihood of the same amount being passed on to the second generation falls to 64 percent, to 51 percent for the third, and to 41 percent for the fourth. If we take 1865 as the final year of slavery, and thirty years to represent a generation, then we are roughly four and a half generations beyond the period of slavery now.

For this reason – that is, because of the uncertainty created by the passage of time – a sort of scholarly consensus seems to have emerged that the demands for slave labor damages brought by the immediate descendants of Holocaust victims have a considerably greater moral claim to compensation than those of African Americans. In particular, corrective justice theorists have made three arguments that tend to support such a distinction. One argument is based on the notion of causation, and holds roughly that claims by distant descendants should be regarded as weak (in a moral sense) or undeserving of compensation because of the intervention of so many accidental and intentional acts that have played a role in disadvantaging claimants. George Sher, a moral theorist, and Boris Bittker, a legal theorist, have offered versions of this argument.¹¹⁶ A second argument is based on the notion of indeterminacy, and holds that claims by distant descendants are weak because it is impossible, given the potential for intervention, to know what position claimants would have been in if their ancestors had

¹¹⁵ See, e.g., Kerwin Kofi Charles and Erik Hurst, The Correlation of Wealth Across Generations, National Bureau of Economic Research, Working Paper No. 9314, <http://www.nber.org/papers/w9314>. Charles and Hurst find that the elasticity of child wealth with respect to parental wealth is .37. Thus, a one dollar increase in parental wealth generally leads to an increase of 37 cents in child wealth.

¹¹⁶ George Sher, Ancient Wrongs and Modern Rights, 10 *Philosophy & Public Affairs* 3 (1981); Boris Bittker, *The Case for Black Reparations* (1973). Bittker favors reparations, but argues that they should be based on discriminatory or oppressive policies that operate in the present or very recent past

not suffered the injury which motivates the claim for reparations.¹¹⁷ A third argument is based on the notion of rights fading or extinguishing over time, and holds that claims by distant descendants are undeserving of compensation because too much time has passed and expectations have settled. Both of the last two arguments have been made by Jeremy Waldron,¹¹⁸ and a version of the third has been offered by Janna Thompson.¹¹⁹

The new-formed consensus among corrective justice theorists suggests that the slavery claims based on the Holocaust are morally deserving of compensation while those of African Americans are not.¹²⁰ This is an arbitrary dividing line because there are many reasons to question whether money would have been passed on even to the first generation. As Thompson notes, Robert Nozick ran into this problem, though stated in more general terms, in the course of setting out principles for distributive justice,¹²¹ and refused to try to draw a line between generations that deserved reparative justice (“rectification”) and those that did not.¹²² Still, the reasoning of modern consensus is

¹¹⁷ I should take a moment to distinguish one version of the indeterminacy argument that should be rejected right away. That is the argument that African-Americans have no moral claim to compensation because they would not exist as citizens in the U.S. if their ancestors had not been brought over as slaves. For a discussion, see Sher, *supra* note 107, at 6-8. This argument seems superficially appealing only if one chooses to lump all of the actions of slaveholders together in one discrete mass. However, the pattern of historical injustices can (and should) be broken down into the many different discrete instances in which a choice with moral implications was presented. See, e.g., Lyons, *Unfinished Business*, *supra* note 93. Slavery involved an extremely large number of discrete events of this type. After bringing the slave over in chains, the slaveholder had a choice whether to force him to work the first day or set him free, the same choice the second day, the third day, and so on. Each decision to continue as slaveholder would seem to deserve moral condemnation.

¹¹⁸ Jeremy Waldron, *Superseding Historical Injustice*, 103 *Ethics* 4 (1992). Sher, *supra* note 107, also makes these arguments. On the notion that the moral basis of a right to property fades or changes over time, see David Lyons, *The New Indian Claims and the Original Rights to Land*, 4 *Social Theory and Practice* 249 (1977).

¹¹⁹ Janna Thompson, *Historical Injustice and Reparation: Justifying Claims of Descendants*, 112 *Ethics* 114 (October 2001).

¹²⁰ For an earlier and dissenting view (specifically, a rather rigid moral argument favoring reparations for both recent and distant injuries), see Bernard Boxill, *The Morality of Reparation*, 2 *Social Theory and Practice* 113 (1972).

¹²¹ Robert Nozick, *Anarchy, State, and Utopia*, chapter 7 (New York: Basic Books, 1974). For Nozick’s brief discussion of approaches to rectification, see *id.*, 230-31.

¹²² Thompson, *supra* note 110, at 121.

consistent with the approach of traditional tort law, particularly the *Ryan* case, which holds that the defendant's liability stops the moment the fire spreads from the first home. In the same sense, a consensus view seems to be emerging that liability for slave labor stops the moment the damage spreads from the first generation of descendants.¹²³

Since the slave was not paid as a regular laborer, and the value of his effort above what was necessary to maintain him went to the slaveholder, it may be appropriate to treat slave labor damages as a claim for restitution. The *FleetBoston* reparations complaint included a claim for restitution.¹²⁴ Under a restitution theory, the slaveholder would be asked to return to his victim the gain or profit he enjoyed as a result of slavery. This would lead to a larger damage claim than one based on unpaid wages. For example, if the value of an hour of the slave's work to the slaveholder was \$20, and the slaveholder paid the slave (in terms of food and housing) \$10, then a claim for unpaid wages might lead to a damage award equal to the difference between the wage that would have been paid and the \$10 actually paid. If the wage that would have been paid is \$14, then the damage award would be equal to \$4 multiplied by the number of hours. A claim for restitution, however, would lead to a damage award equal to \$10 multiplied by the number of hours.

There is always a question in torts whether to treat a claim for restitution as merely a remedial measure or as a completely different theory supporting the plaintiff's

¹²³ As an empirical matter, the assumption that the effects have worn off after one generation appears to be consistent with the results of the Sacerdote study, provided the comparison is limited to income and literacy. See Bruce Sacerdote, *supra* note 74. However, Sacerdote finds that the likelihood of being in a female-headed household remains significantly higher for slave descendants even into the second generation (that of grandchildren). *Id.* at 5. Thus, the empirical evidence suggests that the family instability effects of slavery were passed on to at least two successive generations.

¹²⁴ See Complaint and Jury Trial Demand at 17, Farmer-Paellman (No. CV 02-1892); Second Consolidated and Amended Complaint and Jury Trial Demand at 60-61, African American Slave Descendants Litigation (No. 02-7764).

claim.¹²⁵ Viewed purely as a remedial measure, we would treat the prior proof requisites of duty, breach, and causation as unaffected by the plaintiff's claim for restitution, and merely insert a claim for restitution once we reached the last stage of the plaintiff's case, the proof of damages. In contrast, viewed as an alternative tort theory, we would take a different approach to the questions of duty and breach if we know that the plaintiff intends to seek restitution.

I think the better approach is to treat the restitution claim as an alternative tort theory. Restitutionary or gain-eliminating penalties should be applied to a special class of torts.¹²⁶ One is the case in which the injurer has acted with the type of "specific intent" that the criminal law looks for. For example, suppose the injurer intentionally burns down the plaintiff's house. Following Posner,¹²⁷ I will label this type of conduct as "market bypassing." All injuries involving expropriative conduct, where the injurer takes or destroys something that could have been transferred to him through a consensual transaction, fall into this category.¹²⁸ The other case is that in which the injurer's conduct is always socially undesirable, under any set of circumstances. Unambiguously-socially-undesirable conduct is of the type in which the gain to the actor (or anyone else) is far less than the expected harm resulting from the conduct. For example, consider an injurer that drives recklessly through a crowded area.

¹²⁵ Most scholars have framed the question as whether restitution is appropriate for all tort claims or some special set of claims. See generally, Prosser, *Handbook*, supra note 18, at 627-29; Daniel Friedmann, *Restitution of Benefits Obtained Through the Appropriation of Property or the Commission of a Wrong*, 80 *Columbia L. Rev.* 504, 506-510 (1980).

¹²⁶ On the role of gain-eliminating penalties, see Keith N. Hylton, *Punitive Damages and the Economic Theory of Penalties*, 87 *Geo. L. J.* 421 (1998); *id.* Brief Amicus Curiae of Keith N. Hylton in Support of Respondents, *State Farm Mutual Automobile Insurance Co. v. Campbell*, ___ U.S. ___ (2003).

¹²⁷ Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 *Columbia L. Rev.* 1193 (1985).

¹²⁸ The key to "market bypassing" under this theory, is not that the injurer has expropriated some recognized property right, as suggested in Friedmann, supra note 122, at 510-29. The property-based approach to restitution generates confusion. The key to the market-bypassing approach is that it looks for forced transfers that occur in setting in which a consensual transfer could have been arranged easily.

The reason restitutionary or gain-eliminating damage awards are appropriate in the two general cases just identified – market bypassing and unambiguously-socially-undesirable conduct – is that the goal of a damage award in these settings is to completely deter the injurer’s conduct. In other words, restitution damages differ from compensatory damages in the sense that the latter aim merely to internalize the victim’s loss while the former aim to put an end to the injurer’s conduct. Restitution damages are appropriate when applied to market bypassing and unambiguously-socially-undesirable conduct because both types have no social benefit of any sort.¹²⁹ The socially optimal level of market bypassing conduct, such as theft, is zero. On the other hand, compensatory damages are typically appropriate when the underlying conduct offers some social benefit. For example, the activity of running a railroad is clearly beneficial to society. Damages for the negligent operation of a railroad should therefore be limited to the compensatory level.

To complete this thumbnail sketch of the theory of damages, I should describe the role played by compensation. Nothing I have said so far provides a reason for giving the

¹²⁹ I find this theory of restitution far simpler than that alternatives based on notions of protecting autonomy. See Hanoch Dagan, *Restitution and Slavery*, 84 *Boston University Law Review* (forthcoming 2004); *The Law and Ethics of Restitution* 246-59 (forthcoming 2004). While I find Dagan’s theory intuitively appealing, I think it is far simpler to say that restitution aims to eliminate the wrongdoer’s gain in the two general cases of market-bypassing and always-socially-undesirable conduct. For criticism of Dagan’s view of restitution – largely on the ground that restitutionary damages commodify slave labor – see Anthony Sebok, *Two Concepts of Injustice in Restitution for Slavery*, 84 *B.U.L. Rev.* xx, xx (2004). To some extent, the commodification critique is consistent with my claim that the tort system is simply inadequate to compensate for many of the harms of slavery – such as the slave marriage. However, this is a problem with monetary damages as a general matter. Moreover, given that the theory of a restitutionary award in the case of slavery would be the same as that for conversion (i.e., defendant stole plaintiff’s X, where X is labor or property) I fail to see why the commodification critique is more worrisome in the slavery reparations case than in any other context involving intentional torts. An alternative argument against restitution, offered by Emily Sherwin, is that restitution draws on notions of vengeance or retaliation, which are inappropriate grounds for consideration of publicly controversial issues, see Emily Sherwin, *Reparations and Unjust Enrichment*, 84 *B.U. L. Rev.* (forthcoming 2004). However, much of the criminal draws on notions of vengeance; Holmes, *supra* note 8, 2-34; and still we should not allow that concern to constrain its scope of application.

damage award to the victim rather than the state. This is an especially important question in the case of restitution because one could make a plausible argument that the state rather than the victim should receive an award designed primarily to punish. One could defend the awarding of restitutionary damages to victims on the ground that victims have the greatest incentives to sue, to act as private attorneys general. However, the reason that seems to fit best with history is the notion that awarding damages to victims buys public peace.¹³⁰ If victims are not compensated, they will have incentives to seek revenge or to retaliate in some way against the injurer.

Under this theory of damages, slavery would appear to be appropriate for a restitution-based damage claim because the slaveholder has stolen the labor of his victim, a classic case of bypassing the market. The fact that it was lawful at the time it occurred should not be considered an obstacle under the theory developed here. As I said before, arguments against legal revisionism or retroactive application of the law should be dismissed in the special case of slavery. The slaveholder sought a regime in which the law simply did not apply to his relationship with the slave. Since the institution operated under the slaveholder's law rather than the law of the state, the state has no obligation to respect rights allocated according to the slaveholder's law. The state has no more of an obligation to respect the slaveholder's law than it has to respect that of a warlord.

However, as a positive matter the restitution claim, like that for compensatory damages, runs into the problem created by the passage of time. To be sure, the passage-of-time argument is different in this case, and arguably allows more room for the reparations plaintiffs to be compensated. In the compensatory damages case that we

¹³⁰ See Holmes, *supra* note 8, at 2-34 (arguing that vengeance is basis of law and tracing historical development of criminal and tort law); Smith, *supra* note 7, at 106-10 (tracing development of criminal law from system based on compensation of victims).

considered earlier, the passage-of-time argument severely weakened the causation part of the plaintiff's claim, because there were so many ways that the slave's surplus labor could have been squandered or diverted to other uses over four, five, or six generations. In the restitution-based damages case, we are not concerned so much with causation as with the dilution of the signal that a restitution award is designed to send. If the purpose of the award is to say to the injurers, "you will never gain a penny from this conduct," then we have no reason to believe that this message is communicated by a penalty that falls four or five generations after the initial wrong.¹³¹

Though far from an easy victory, it should be clear that reparations plaintiffs have a stronger argument under the restitution theory than under the compensatory damages claim. If, one might argue, courts awarded restitution damages four or five generations after the initial wrong, then potential injurers might realize that any harms they inflict today will revisit their children or their children's children in the form of a claim for damages, and this could deter them committing the initial wrong. This is a plausible argument, and one could not accuse a court of having misunderstood restitution doctrine if on the basis of this argument it awarded restitution damages for slavery. However, as a practical matter it seems unlikely that a gain-eliminating judgment imposed four or five generations after the initial harm could have a significant deterrent effect. Looking

¹³¹ For a general discussion of the prescription of rights that is consistent with this position, see Smith, at 135-38. For a brief statement of a roughly similar point made in the context of reparations claims, see Saul Levmore, *supra* note 5, at 1687. More recent economic justifications of the prescription of rights have focused on the balance between the benefit from deterrence and the cost of litigation (or of law enforcement). See Thomas J. Miceli, *Deterrence, Litigation Costs, and the Statute of Limitations for Torts Suits*, 20 *International Review of Law and Economics* 383 (2000) (arguing that as time passes, the deterrence benefit falls as litigation costs increase, making it efficient to bar litigation after some cut-off date); Yair Listoken, *Efficient Time Bars: A New Rationale for the Existence of Statutes of Limitations in Criminal Law*, 31 *J. Leg. Stud.* 99 (2002) (as time passes, the deterrence benefit falls, while the enforcement cost remains fixed or increases, making it efficient to bar criminal prosecutions after some cut-off date).

forward, the slaveholder may think that his genetic connection to his great-great grandchildren is just too remote for him to worry about their welfare. Similarly, the plaintiffs, descendants of victims, may be so remotely connected to the initial victims that one cannot plausibly believe that public order or peace is being protected by awarding them compensation.

No American court, in recent years, has awarded a judgment for a plaintiff on a damages claim for slavery, either for compensatory or restitution-based damages.¹³² The *FleetBoston* complaint, after consolidation with other cases, produced a long opinion dismissing it on several grounds,¹³³ though the amended version of that complaint is still alive. However, any court handing down a decision in a modern reparations case would probably remain in line with existing tort doctrine, and hold that far too much time has passed and too many actions have intervened for the plaintiffs to establish a satisfactory causal connection between their injuries and the wrongs committed by the predecessors of the defendant corporations. To be sure, the court may not use the language of proximate cause. It may instead refer to a statute of limitations, or, as the court in *Moch*, to the defendant's zone of duty under tort law. All of these arguments are reducible to the core passage-of-time problem that severely weakens the legal basis for compensating reparations plaintiffs.¹³⁴ When compared to the precedent of sorts set by the Holocaust

¹³² Of course, there were several cases in which damages were awarded to former slaves during the 19th century, see Kull, *supra* note 6.

¹³³ *African-American Slave Descendants Litigation*, ___ F.Supp. 2d (N.D. Ill. 2004). For a critique of the opinion, see Richard Epstein, *The Case Against Black Reparations*, 84 *Boston University Law Review* (forthcoming 2004).

¹³⁴ My position is consistent with that of Epstein, *supra* note 133. Although Epstein agrees with the final outcome (dismissal) in *African-American Slave Descendants Litigation*, he shows that many of the arguments used in that opinion were invalid. The causation and prescription arguments were perhaps the only valid arguments of that opinion.

settlements, this may appear to be an arbitrary conclusion. However, that is always true to some extent of proximate cause holdings. A line has to be drawn somewhere.

C. The Normative Question

The question of the moment is whether, as a normative matter, a decision against reparations plaintiffs based on some version of the passage-of-time criticism is a desirable outcome. Put more generally, is the passage-of-time argument always a defensible ground for rejecting a claim for compensation or restitution? As a general matter, the answer is clearly yes. Expectations have to be settled at some point. From a traditional tort theory perspective, passage of time and intervening actions mean that the deterrent signal connected to any compensation award is weakened beyond usefulness. In addition, as time passes, it becomes increasingly unlikely that the degree of resentment that might threaten public order if plaintiffs are not compensated will ever materialize. All that remains in terms of the social utility of a damages award is its ability to redistribute wealth from the lucky toward the unlucky. But redistribution is not a good use of the tort system.¹³⁵ From a restitution theory perspective, the same arguments apply, though with slight variations. The full deterrence effect of a gain-eliminating judgment is less likely to be observed as we expand the time periods between the commission of the wrong and the judgment. And, as is true in the case of the claim for compensatory damages, the need to avoid retaliation based on resentment falls substantially as time passes.

¹³⁵ For the classic argument against using the tort system primarily as a means of compensating rather than deterring injuries, see Holmes, *supra* note 8, at 96. Holmes notes that the private insurance market is a far more efficient system of compensation. See also, Richard A. Epstein, *The Social Consequences of Common Law Rules*, 95 Harv. L. Rev. 1717 (1982); Louis Kaplow & Steven Shavell, *Why the Legal System is Less Efficient than the Income Tax in Redistributing Income*, 23 J. Legal Stud. 667 (1994).

All I have said so far is that courts have to draw a line at some point, extinguishing tort claims that are too old and distant in terms of intervening events. What about the claims brought by reparations plaintiffs? Are they in the “too old and distant” category? Suppose they are not. Then it is difficult to determine when a claim becomes too old and distant to be a viable one for damages. If four generations is not too long, then why should we consider six generations too long? Once this question is seriously thrown into play in courts, many property rights and legal entitlements start to look less predictable. Since much of law, and especially property law, seeks to settle expectations, this is a position it should avoid.

One might say that this seems inconsistent with my earlier argument that the slaveholder should not be allowed to defend himself on the ground that slavery was legal when it occurred. To say that reparations plaintiffs must lose their case because of the passage of time seems to reassert the slaveholder’s defense in a different guise. But there is a difference between the two defenses, the one based on legality and the other based on the passage of time. Moreover, the reason for rejecting the first and accepting the second is, at its core, the same. The legality argument is rejected because it is an assertion that the warlord’s law (or non-law) should take precedence over or be treated as superior to the law, which should never be the case. The passage of time defense says that rights become too fuzzy and unpredictable to be useful if we allow the plaintiff to prevail. Put another way, the law is at risk of losing its predictability, and hence much of its utility as law, if we allow claims that are extremely old and distant. Both arguments drive toward the same conclusion; that we are rejecting the legality defense and accepting the passage of time defense in order to preserve and protect the social utility of the law.

I hope I have been clear in my view that the rejection of the reparations claim cannot be based on morality. In particular, the new consensus among moral theorists that supports such a rejection, set out most clearly by Waldron, appears deeply flawed upon close examination. The new consensus argument, which holds that tort claims based on slavery are morally undeserving of compensation because they are too old and distant, is quite consistent with tort doctrine. But the law has to reach this position not for moral reasons, but to preserve its own social utility. Moral arguments should have a different flavor and should involve at least some norms that are not diminished by the mere passage of time or by every change of circumstances. For otherwise, corrective justice theory becomes a version of economics – practiced without the constraint of mathematical modeling.

Waldron argues that reparative claims have to be cut off after a lot of time has passed because people plan their lives around their possessions.¹³⁶ The descendants of the initial expropriators have planned their lives around the expropriated property that they inherited. The descendants of the initial victims of expropriation have also planned their lives around the absence of the expropriated property. If the moral basis for recognizing property rights is to permit individuals to plan and create their own lives – to exercise autonomy – then it should follow that there is a moral basis for refusing to redistribute entitlements after a lot of time has passed.

While it is certainly true that people plan their lives around their possessions, this does not create a moral basis for denying reparative justice claims. To be sure, it creates a utilitarian or economic basis for denying such claims, but the moral basis for the reparative claim would seem to be constant. This is probably the reason Nozick refused

¹³⁶ Waldron, *supra* note 109, at 16-20.

to get into the business of distinguishing between generations whose claims to reparative justice were morally sound and those whose claims were not.¹³⁷ Once you get into the business of drawing these lines, you are sliding fast down a slope that ends in utilitarianism.

Moral arguments cannot be used persuasively to reject claims for reparative justice brought by descendants of slaves. The torts of American slavery, especially the social torts, inflicted serious injuries, some with the capacity to return and injure successive generations. Slavery launched racism as a belief structure designed to maintain an inefficient social order, which remains a force today. It seems fairly easy on moral grounds to say that its beneficiaries should pay up.¹³⁸ Kant, who went further than anyone else in an attempt to create a logically consistent set of moral laws, said the following about just deserts:

What kind and what degree of punishment does public legal justice adopt as its principle and standard? None other than the principle of equality (illustrated by the pointer on the scales of justice), that is, the principle of not treating one side more favorably than the other. Accordingly, any undeserved evil that you inflict on someone else among the people is one that you do to yourself. If you vilify him, you vilify yourself; if you steal from him, you steal from yourself; if you kill him, you kill yourself... If he has committed a murder, he must die. In this case, there is no substitute that will satisfy the requirements of legal justice. There is no sameness of kind between death and remaining alive even under the most miserable conditions, and consequently there is also no equality between the crime and the retribution unless the criminal is judicially condemned and put to death. .. Even if a civil society were to dissolve itself by common agreement of all its members (for example, if the people inhabiting an island decided to separate and disperse themselves around the world), the last murderer remaining in prison must first be executed, so that everyone

¹³⁷ Nozick's discussion of the principle of rectification (or, in the terms used in this paper, reparative justice) doesn't go much beyond stating general principles. Nozick, *supra* note 112, at 152-3, 230 -31. However, Nozick's principles suggest that reparative rights are constant.

¹³⁸ Boxill, *supra* note 111. For a general review and critique of the moral arguments for slavery-based reparations, see David Lyons, *Corrective Justice, Equal Opportunity, and the Legacy of Slavery* and Jim Crow, 84 B.U. L. Rev. (forthcoming 2004).

will duly receive what his actions are worth and so that the bloodguilt thereof will not be fixed on the people because they failed to insist on carrying out the punishment; for if they fail to do so, they may be regarded as accomplices in this public violation of legal justice.¹³⁹

Kant's emphasis on equality would seem to suggest that restitution should be required of the slaveholders. His emphasis on society's need to purge itself of the "bloodguilt" from a crime would seem to suggest a continuing responsibility on the part of successive generations to restore equality, in order to avoid being accomplices in the initial violation of justice.

In any event, I do not regard the moral arguments as leaving room for only one position on the reparations claims. Neither are utilitarian arguments, generally, capable of delivering a clear answer on the reparations issue. The only argument I see capable of yielding an answer is a utilitarian argument of a particular type – specifically, what has been set out so far in this part, which is an argument that reparations claims by descendants of slaves should be regarded as viable tort claims only to the extent they are consistent with tort law's regulatory function.

IV. The Accounting Claim

The *FleetBoston* reparations complaint included a demand for an accounting of the ways in which the predecessors of the defendant corporations profited from slavery.¹⁴⁰ This is an unusual claim, one that hardly ever arises in tort actions. An accounting would ordinarily fall out of a tort suit as the defendant offers justifications or

¹³⁹ Immanuel Kant, *Metaphysical Elements of Justice* 332-34 (John Ladel trans., Hackett Publishing Co. 2d ed. 1999)(1797).

¹⁴⁰ Complaint and Jury Trial Demand at 15, *Farmer-Paellman* (No. CV 02-1862)

excuses for his conduct. The plaintiff, for his part, would offer theories of the defendant's conduct in the course of the suit. The result of a trial is an official account of the defendant's conduct resulting either in a damage award for the plaintiff or a victory for the defendant. The fact reparations plaintiffs included a separate demand for an accounting suggests that there is something special about this part of the lawsuit.

There are reasons to think that the accounting demand is especially important in a reparations suit and that it may be the one part of the plaintiff's claim that offers the potential for social gain. Slavery, quite plausibly, has had a ripple effect lasting through several generations. The need to threaten slaves with force and to maintain a social hierarchy that kept them at the bottom produced a sturdy brand of racism that embedded itself in the social institutions that maintained that order – police, courts, schools, and some private corporations. Most of us have no way of knowing how serious this racism was, how frequently it appeared in practice, and the extent to which it affects decisions people make today. Indeed, the fact that the reparations plaintiffs have had to *ask* for the accounting, and that it is not already a matter of public record, suggests that the defendants may have in their hands private records that could prove embarrassing or shameful, and at the least could shed new light on past events.

But why dig up potentially embarrassing records from the past? Doesn't everyone have something they would like to hide from the public? Probably so, but this is a different case from that of exposing personal records on an individual, like tax or medical records. Corporations and government entities should be required to make public records that reveal the profits or gains they or their predecessors made from slavery and from the oppressive regimes that appeared in its wake. This would include

not only the slavery-related profit records demanded by reparations plaintiffs. It would also require disclosing information on ways firms profited from the violence used against African Americans during and after slavery. For example, a railroad that scheduled extra service so that the local public could attend a lynching should be required to reveal these records of its history.¹⁴¹ It should also require revealing blatantly discriminatory policies adopted in the recent past.

Making this information public would benefit historians, which might be a sufficient reason but not by any means the most important reason. The important reasons are to lay the foundation for a more productive exchange on racial issues in the public square and to minimize the likelihood of discrimination in the present. As long as successors of firms that profited from slavery and descendants of slaveholders approach the public square with white-washed histories, claiming to know nothing of the past other than pleasantries, there will be a considerable degree of dishonesty with a concomitant level of distrust in public discussions of racial issues. And as long as corporations or other entities are sitting on top of private information that shows participation in racial oppression or discrimination in the past, we will have to wonder about their incentives not to discriminate in the present.

Jeremy Waldron's discussion of historic injustices suggests that the benefits of an accounting could be deeper and broader than I have suggested. He claims that getting the truth out on the table sustains "the moral and cultural reality of self and community."¹⁴² On a more prosaic level, getting the truth about historic injustices on the table counteracts

¹⁴¹ Dray, *supra* note 97, at __ (describing the scheduling of extra service to facilitate lynching spectators).

¹⁴² Waldron, *supra* note 109, at 6.

the propagation of racist, or more generally, “essentialist” beliefs.¹⁴³ For as Waldron notes, letting bygones be bygones opens an informational vacuum which is soon filled by self-serving tales of moral desert by the victors. It appears to be human nature to attribute success and failure to some supposedly essential characteristic – perhaps race, or character, or to an illusive general intelligence factor.¹⁴⁴ The more complicated history has to continually be brought into plain view in order to prevent some version of the essentialist story from taking precedence. This is a worthwhile goal because essentialist stories tend to encourage both the imposition by history’s victors and acceptance by history’s victims of new injustices.

These potential benefits are not present in every case in which a firm’s predecessor participated in or profited from slavery or some other oppressive regime. In some cases, knowing whether a firm’s predecessor profited from slavery tells us very little. Take the case of an insurance company that profited from insuring slaves. Does this suggest that the work of the insurance firm made slavery a more oppressive regime? Not necessarily. The firm’s activity in the insurance market may have made slavery a less oppressive regime. Property insurers charge deductibles and sometimes offer prices that encourage the insured to reduce the risk of losing property (e.g., discounts for installing burglar alarms in homes). There is no reason to believe a priori that an insurer that profited from slavery made the regime more oppressive. The historical evidence may be able to tell us whether the insurer’s participation made the regime more or less oppressive.

¹⁴³ I mean essentialist in the sense used by Popper, *supra* note 13, which is the view that history can be explained by essential traits or features of its participants (or of a system or institution) that allow us to predict the course of events.

¹⁴⁴ Richard Herrnstein & Charles Murray, *The Bell Curve: Intelligence and Class Structure in American Life* (1994). For a critique, see James J. Heckman, *Lessons from the Bell Curve*, 103 *J. Pol. Econ.* 109 (1995).

Suppose, instead, the insurance firm adopted a discriminatory policy of refusing to offer insurance of any type to blacks. The firm's reason could be based on some version of the statistical discrimination theory or some more invidious type of discrimination. This history should be a part of the public record. If it is not, and the firm desires to keep it buried in its records, then the firm will have an incentive to refuse to hire or promote black employees. Having potentially embarrassing information or secrets of this sort sitting in business files promotes a culture in which the fact of oppression or discrimination in the past becomes a motivation for discrimination in the present. Putting this information into the public light removes this incentive to discriminate.

Now consider a different example: a politician who has inherited his money from slaveholding ancestors runs for governor. When asked where the money came from, he tells the public that he was a success in business – say, a venture capitalist. Should the fact that the politician's wealth has largely been handed down by slaveholders be a matter of public concern? I think so. That the politician wants to hide this fact from the public is itself a concern, because it suggests he is unwilling to publicly confront the issues that it would naturally generate if made public.

Unlike the demand for damages, the accounting demand does not seem to pose any potential dangers for the legal system, or any particularly large social costs. They do not seem, as some have feared, to exacerbate racism by forcing unsuspecting white defendants to pay damages to a large, indefinite class of black plaintiffs.¹⁴⁵ They do not appear to offer a cheap apology, allowing potential defendants to wash their hands of the

¹⁴⁵ See, e.g., Eric K. Yamamoto, Racial Reparations: Japanese American Redress and African American Claims, 19 B.C. Third World L.J. ___, 510-13 (1998).

matter and to say that discrimination has, for once and for all, been paid for.¹⁴⁶ On the other hand, they do have the capacity to lessen discrimination's regenerative capacity, and to give society a clearer view on the social costs of racism.

It should be clear that a parallel can be drawn to the case of families and firms that hold information on ancestors or predecessor firms that participated in the Holocaust. This information should be made public for reasons roughly similar to those set out already for the slavery case. If anything, the argument for disclosure is considerably stronger because the injuries were inflicted more recently. Indeed, rather than having all of this information dug out through lawsuits, the better approach is to pass a law requiring firms and families to divulge information on participation in slavery or in the Holocaust. There is no need to establish a penalty, such as a fine or jail term, for failing to divulge the information. Failure to disclose the information should become over time a black mark by itself, because it indicates that the holder of the information preferred to stay silent rather than disclose. By staying silent rather than disclosing, the holder of the information is avoiding a public confrontation with the issues generated by the slavery and Holocaust lawsuits, and helping, albeit in a small way, to preserve a public state of detachment and denial that makes oppressive and discriminatory regimes possible.

V. Conclusion

The *FleetBoston* reparations complaint, with its light treatment of statistics and cites to articles from *USA Today*, appeared to have taken the text of a talk given to

¹⁴⁶ Glenn C. Loury, *It's Futile to Put a Price on Slavery*, N.Y. Times, May 29, 2000, at A15; Rhonda V. Magee, *supra* note 5, at 880-81.

student groups on college campuses and put it into the courtroom. Perhaps the plaintiffs will rely on more rigorous statistical evidence to make their case as the litigation progresses, but the start was far from promising in this respect. A serious case for slavery reparations, if possible, will have to be built on statistical analysis rather than appeals to the emotions.¹⁴⁷ When someone, maybe a later set of plaintiffs, finally gets around to doing this, they will have a particularly hard time dealing with the passage of time and intervention issues that have to be satisfied by any tort claim.

¹⁴⁷ The general “game plan” for a reparations lawsuit, if it is to be successful, was suggested by Nozick’s brief discussion of the implementation of the rectification principle. “[L]et us suppose theoretical investigation will produce a principle of rectification. This principle uses historical information about previous situations and injustices done in them . . . , and information about the actual course of events that flowed from these injustices, until the present, and it yields a description (or descriptions) of holdings in society. The principle of rectification presumably will make use of its best estimate of subjunctive information about what would have occurred (or a probability distribution over what might have occurred, using the expected value) if the injustice had not taken place. If the actual description of holdings turns out not to be one of the descriptions yielded by the principle, then one of the descriptions yielded must be realized.” Nozick, *supra* note 112, at 152-53.