

‘The Poetics and Politics of Past Injuries: Claiming in Reparations Law and in Toni Morrison's novel *Beloved*’

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Abstract

Why is there such a discrepancy between legal time and historical time? Or rather, whose historical time is tacitly represented and silently justified in legal representations? Whose interests are served by the law's particular fictions and whose injuries are privileged? In exploring these questions I will focus on the 2006 case of *In re African-American Slave Descendants*, a claim made for reparations for slavery in the U.S. Since the 1980s a number of litigants have filed claims for injuries arising out of slavery and none has succeeded, but these very failures are worth examining for what they reveal about the contemporary inability to reconcile the demands of the past on the present.

Throughout the twentieth century, historians challenged the idea that we have transparent access to historical truths, which has obvious implications for the status of the legal text; and yet the law itself has remained largely untouched by these insights. However, I argue that reparations cases can be read as theorising a new relationship between law and history, and as interventions in the law's logic of time. Reparations claims intercept legal logic in at least two important ways: first, by insisting on the continuing damage of slavery, the claims defy positivist representations of history and time; and second, in their reliance on the legal fiction of corporate identity across time, these cases allude to the interconnected history of the fictions of corporate and slave identities, and potentially rework these fictions in the direction of social justice.

Keywords

Reparations; History of Slavery; Law and Literature; Corporate Personhood; Toni Morrison

‘Within the text of the law there is an afterlife of slavery ... as matters of aesthetic and legal representation ... as an aesthetics of legal representation’

—Stephen Best (2004: 14).

‘All of it is now it is always now’

—Toni Morrison (1987: 248)

Representing History and Time

In the U.S., as in Australia, there have recently been a number of attempts to articulate the claims of past injustices on the present, and determine the law’s relationship to these claims. Arguments have been made in legal, critical and cultural domains about both the nature of historical claims and the ways in which they might (and should) be resolved.² In this paper I consider the 2006 case of *In re African-American Slave Descendants*, (hereafter “*Slave Descendants*”), which is the most recent in a group of reparations cases in which litigants sued for damages arising out of the historical injustices of slavery³. None of these cases has succeeded, but these very failures are worth examining for the contradictions they expose in the law’s narration of the past. While a number of law and literature scholars have drawn analogies between legal and literary practices of representation⁴, I am interested here in focusing on moments when the law self-consciously creates legal concepts. I loosely call this practice the creation of ‘fictions’ in the law. The use of legal ‘fictions’ seems to have arisen implicitly in the reparations cases as a potential site for challenging not only legal, but also cultural understandings of contemporary responsibility for injustices of the past⁵.

Throughout the twentieth century, historians challenged the idea that we have transparent access to historical truths, which has obvious implications for the status of the legal text; and yet the law itself has remained largely untouched by these insights. Critical legal theorists have challenged the law’s underlying assumptions, as well as its version of history; here I am suggesting that we turn our attention to the staging of history in literary works, and use literary arguments about history to intervene in the law’s logics. By the phrase ‘law’s logics,’ I mean the liberal, Enlightenment assumptions underpinning the law, (usually unstated), which have been the focus of critical scholarship⁶. Literature has much to offer this critical debate on historical injustices, due to both its similarities and differences to the law. The literature of historical injustice shares thematic concerns with the law such as the nature of trauma, time, and history; but one of the key differences between law and literature is literature’s self-awareness of its status as representation, which in the law is generally ignored or refused. Literature, then, becomes a place from which we might theorise history as a technique or argument about the world, a site from which we might explore the relationship between materiality and the representations produced in response to material conditions.

The Case For An Alternative Representation of Legal Time

In the 2006 *Slave Descendants* case, the United States Court of Appeals for the Seventh Circuit heard an action comprising ‘... class actions on behalf of all Americans descended from slaves’(at 7), against companies or their successors who had been slave-owners, or who had provided services (such as insurance, finance and transportation) to

slave-owners (at 7-8). The claim was based on consumer protection law, tort and unjust enrichment. The lead Circuit Judge, Judge Posner, gave a number of reasons for dismissing the case, but in this essay I will focus on those reasons relating to the statute of limitations and equitable tolling, and the particular narrative of American history on which they rely.

Courts adjudicating reparations cases have consistently held that plaintiffs are not entitled to sue because so much time has passed since the events of slavery, far exceeding the time permitted under statutes of limitations. However, the statute of limitations is an arbitrary creation; further, even within the terms of the principle, it is open to these courts to disregard the statute of limitations using the principle of equitable tolling, which recognizes that in some situations it is impossible for potential plaintiffs to make a claim.

In *Sandvik v. United States*, the court formulated the principle as follows:

equitable tolling is appropriate when a movant untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence (at 1271).

In the context of litigation for damages arising out of the Holocaust, the statute of limitations was again tolled over many years in *Bodner v. Banque Paribas* because of ‘extraordinary circumstances,’ the court stating:

[o]ne example of an ‘extraordinary circumstance’ meriting equitable tolling may be where plaintiffs can show that it would have been impossible for a reasonably prudent person to learn or discover critical facts underlying their claim (at 135).

In applying equitable tolling and disregarding the statute of limitations, the court recognises the specific, material realities in which the claim is made, including the historical context of the claim. And yet, the history of slavery and what followed do not count as ‘extraordinary circumstances’ in the *Slave Descendants* case: no consideration is given to the collective wrongdoing during slavery, nor to the effects of slavery and racism from 1865 onwards. During the Reconstruction period following the official end of slavery, and into the twentieth century, racism operated systematically, both outside the law’s boundaries—through practices such as lynching—but also as a matter of law, through cases such as *Plessy v. Ferguson*, which upheld the constitutionality of racial segregation through the principle that the races were ‘separate but equal’. However, Judge Posner refused the availability of equitable tolling in *Slave Descendants*, arguing:

... suits complaining about injuries that occurred more than a century and a half ago have been barred for a long time by the applicable state statutes of limitations. It is true that tolling doctrines can extend the time to sue well beyond the period of limitations—but not to a century and more beyond. Slaves could not sue, and even after the Thirteenth Amendment became effective in 1865 suits such as these, if brought in the South, would not have received a fair hearing. However, some northern courts would have been receptive to such suits, and since the defendants are (and were) northern companies, venue would have been proper in those states. Even in the South, descendants of slaves have had decades of effective access to the courts to seek redress for the wrongs of which they complain. And it's not as if it had been a deep mystery that corporations were involved in the operation of the slave system (at 24-5).

Although Posner admitted that slaves and ex-slaves ‘would not have received a fair hearing’ in the south, he insisted they could have made claims in the north. But Posner’s consideration of the hypothetical case in which a slave or ex-slave might have made a reparations case in the north before the statute of limitations expired ignores material historical conditions, especially the legal reality of the operation of racism in the courts following the official end of slavery. When Posner states that ‘descendants of slaves have had decades of effective access to the courts,’ he means that technical, formal access to the courts was available to African Americans. However, African Americans had little material access to the courts, and even when claims were made, they failed or were retracted: African Americans have been attempting to make reparations claims to unreceptive courts for a long time, since the post-Civil War demands for ‘forty acres and a mule’ (Ogletree 2003: 286-87; Gross 2008: 311-12). But for Posner, the only ‘deep mystery’ concerning the absence of reparations cases lies with the limited question of the state of knowledge of the plaintiffs, who should have obviously understood that ‘corporations were involved with in the operation of the slave system’; rhetorically, this move allows to Posner to occlude other possibilities that explain the failure of these cases, such as failures of the legal system itself. The case reveals the incompatibility of two logics, each relying on two different kinds of history: the plaintiff’s history is materialist and new historicist, and argues the political and legal impossibility of staging reparations claims until a fairly recent point in time; the court’s (and the defendants’) is positivist and formal. It might seem tautological that the court’s representation of time is legal and formal; and yet, there is no legal necessity requiring the court to rely on such a restricted reading of time, which in turn narrates a particular history. This history is the classical liberal narrative of how things work, a history which denies the materiality and specificity of experience, and the operations of power arising out of race, class and gender. By failing to read legal and extra-legal racism across time as ‘extraordinary circumstances,’ the court not only excludes reparations for past suffering, but disguises the fact of the law’s historical complicity in these exclusions. It would be impossible to disentangle the law’s responsibility for racism from cultural responsibility: the effect of racism across time is an effect of both legal and extra-legal practices. However, as a matter of social justice, (as well as the arguably more narrow concept of legal justice), it is crucial that the law examines its narrative of the past and becomes aware of its own role in narrating a limited history.

Although the judgments in the reparations cases explicitly deny alternatives to the law’s representations of history and time, the cases themselves, read in context, demonstrate contradictions in the law’s logic, and reveal the law’s complicity in the historical processes of slavery. Reparations claims—particularly those framed as unjust enrichment—reveal the enduring benefits of slavery to universities, corporations, insurance companies and the state, and show the articulation of capitalism with slavery, an articulation achieved with the complicity of law. The plaintiffs’ demands for an accounting of slavery by corporations, combined with the legal status of corporations as entities which are ‘immortal’ in time, reveal the historical, cultural and legal realities that slavery has endured across time, both materially and symbolically. This past-present connection makes contemporary social, political and economic domains clearly accountable to their roots in slavery: ethically, where collective benefit has accrued, collective responsibility should follow. The cases partly function as ethical and rhetorical

discourses—but they also directly challenge legal reasoning, revealing the contradiction of excluding some fictions while others flourish; and they reveal the materiality behind these discourses: the relationship between the word of law and material benefits to some, material suffering to others. Accordingly, in the following section I read *Slave Descendants* case alongside two fictions: the first is the law's fiction of corporations; the second is Toni Morrison's novel *Beloved*.

Legal and Literary Fictions of Slavery

It might seem strange to place a novel, which has been produced self-consciously as a work of fiction, in relation to a legal case, which seems to be anchored firmly in the 'real world'. And yet, law clearly possesses its own creations, which are sometimes recognised as fictions, but mostly are not; and these fictions have 'real world' effects. Ironically, painfully, the material and legal history of slavery reveals the fact that fiction resides in the law; reveals the ways in which the law is never static or positivist but always political, always changeable, always of its time; and always devising its own way of relating personhood, property, time and responsibility. The legal imagination created slaves as property, and created attendant fictions that transformed acts of the subject into properties of the object: for example, during slavery 'marriage' was a state unavailable to slaves; the agency of slaves who ran away was interpreted as a defect in property (Schafer 1987: 306); and the Fugitive Slave Act (1850) produced legal mechanics for the reclamation of runaway slaves, asserting property rights over subjects-who-were-objects. These legal creations developed in response to historical conditions, especially economics, and had the effect of minimising the costs and uncertainty of the slave trade, thus strengthening the institution of slavery (Schafer 1987: 310-16).

In the reparations cases, plaintiffs sued corporate defendants in unjust enrichment, relying on the nature of corporations, which are the law's creation and sometimes described as fictions. In law, corporations both are and are not the same entities now as they were two hundred years ago—company identities endure across time, but both courts and scholars argue the nature of this identity, and its ability to endure or change according to historical, material circumstances. This ambivalence about the status of the corporation as a 'fiction' is potentially productive for reparations claims: the continuing identity of corporations means plaintiffs can prove a connection between the benefits of slavery to these corporations into the present time; while the corporate identity's relationship to materiality indicates the continuing material benefit of slavery into the present. In contrast to the law on slavery, the law at times staged its awareness of the corporation as a creation. John Marshall, Chief Justice of the United States Supreme Court, expressed the legal imagination at work in relation to the corporation in the 1819 case *Trustees of Dartmouth College v. Woodward*:

A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties that the charter of its creation confers on it, either expressly, or as incidental to its very existence. ... Among the most important are immortality, and ... individuality ... (at 634-35)

According to this case, we must believe that the corporation is a 'creature of law,' but that it is not imaginary. And as a culture, we do. Entire economies and material circumstances rest on this story, while at the same time the fictional nature of the

corporation is kept in the background. The corporation occupies a place of being neither fiction nor reality—it is a kind of literal, material metaphor.

Historically, the legal moves that made the enslaved person property, and the corporate entity a legal person, were interconnected in the law, as the courts battled out the nature of personhood. The 1886 case *Santa Clara County v. Southern Pacific Railroad Co.* which involved two railway companies fighting over fence boundaries, was subsequently used by U.S. courts to extend the rights of corporations on the basis of them being read as natural persons under the 14th Amendment. Although the 14th amendment was written following the Civil War to guarantee the citizenship and liberty of freed slaves, it was used in court many more times by corporations than by African Americans.

Although intimately part of the law's history, legal creations produced for and alongside slavery have only been explicitly engaged by the law in small ways; the reparations cases are part of this engagement, and only because a small group of litigants has pushed against the law's dominant narratives. In contrast, history and personhood have long been countered in literature by a number of novelists, who have taken on the dichotomies of property/personhood and past/present to hold that the historical injuries of slavery exist very much in the present. One of America's most important contemporary writers, and recipient of the Nobel Prize in Literature, Toni Morrison, deals with the continuing legacies of slavery on the present in all her novels, but she most explicitly represents the history of slavery in *Beloved*. The project of imagining the past is necessary because the historical record before and after slavery is missing the narratives of slaves and ex-slaves. Morrison's novels are fictions that challenge the assumptions of law and history; one of her primary aims in writing is to create and restore the stories of those whose experience and presence in the national narrative has been erased; erased because of the material conditions of slavery, because it was impossible or often illegal for slaves and ex-slaves to be educated, and because of the resistance of the dominant culture to the challenges posed by these narratives. Morrison's fictions about the past push against the fictions of dominant politics and culture, which pretend that a liberal version of history is an inclusive, true history. As can be seen from Posner's comments in the *Slave Descendants* case, the law relies on this dominant, liberal version of history. The novel originated in the real-life incidents of a runaway slave, Margaret Garner, who in 1856 killed her own child to keep it out of the hands of her pursuing owner. The act at the centre of the novel—the act of murder by Sethe (Garner's literary counterpart)—is simultaneously an act of destruction of property. Morrison uses this dichotomy to work through the paradoxical and traumatic effects of slavery on subjects, who lived at the intersection of property and personhood, not only during slavery but afterward. Morrison demonstrates that after the point at which slavery ends in law, slavery continues—as a matter of law, as well as culturally and socially. Property and personhood are articulated under slavery laws, and this connection is not easily dissolved: the effects continue through Jim Crow laws, enacted at state and local level between 1876 and 1965, which provided for segregation under the 'separate but equal' principle of *Plessy v. Ferguson*; and out of structural racism, into the present.

Morrison's literary call to responsibility is met in law by the plaintiffs in the case of *Slave Descendants*. By way of relief, the claimants demanded an accounting and disgorgement of the profits arising from companies' dealings with slave-owners to the class members (at 7-8). This call to provide an account is a call to responsibility in a

number of ways, as reading accounts yields the narratives, poetics and politics of the continuing effects of slavery: further, it is a way to connect this responsibility with the continuing material benefits of the historical institution of slavery with the continuing, ‘immortal’ entity of the corporation. The account book records the material and symbolic transformation and equation of human beings into monetary value, demonstrating the ‘epistemic violence’ of the institution (Dussere 2001: 333), and revealing what Hortense Spillers calls the ‘grammar’ of property-personhood-commodity (1987: 79). The effects of this logic are shown in Morrison's own version of the ledger, the chart which the slave owner, Schoolteacher, asks his students to keep concerning the slaves:

[P] ut her human characteristics on the left; her animal ones on the right.

And don't forget to line them up (193).

In demanding an account of the benefits of slavery, claimants in *Slave Descendants* are also demanding a recounting of slavery, thereby demonstrating the articulation of the material and symbolic, an articulation that has always been at the heart of the law. The demands of reparationists towards firms who historically benefited from slavery to provide an account for the profits of slavery is not just symbolic—or if it is, it shows what we already know, that money, value and materiality are both symbolic and real, are processes of reading and interpretation; and that often our division of the ‘real’ and the ‘imaginary’ are arbitrary, selective and motivated. Further, this claim is a claim that reveals the connection between responsibility and representation: the demand for accounting and recounting the material benefits of slavery is a call to justice at the levels of both narrative and materiality.

Whose History? Whose Time? Whose Law?

Legal scholars responding to the call of recent reparations cases have demonstrated how claims may be made in consumer law⁷, constitutional law⁸, and unjust enrichment⁹. In doing so, they use the specificity of the history of slavery to read the injustices of the law's fictions; and they use the law's faulty logic against itself. The potential of the common law is that it combines an interpretation of the past, through precedent, with a creative incorporation of new circumstances and the hope of these reparations claims is that the common law will include different readings of history, time and responsibility as new circumstances. The history tacitly represented and silently justified in current legal representations is the liberal history of the majority, who historically benefited from the conditions of slavery and who continue to benefit. The injuries of slavery become visible under a different kind of history than the law is used to serving. Culturally, politically and legally, we're always choosing which injuries to recognise, represent and compensate, and which to ignore. These choices are produced explicitly and vocally sometimes—by those who clearly denounce the justice of reparations, for example—and subtly and implicitly at other times—through the technical categories of limitations and tolling. As a system of representing and organising the real world, the law relies on metaphors and fictions; there's nothing wrong with that, but there's something wrong with failing to acknowledge and come to terms with the specific choices of *whose* fictions and whose histories are represented in these representations; *whose* law is being applied. A certain kind of legal imagination has so far disallowed recognition for the continuing harms of the past; another kind of legal imagination could recognise these claims, and in doing so reclaim an entirely new history for the law.

And yet, the final contradiction of the case lies in the contrast between the expression and containment of these claims. Their presence in the record of the law clearly exposes contradictions in the law's logics; but on the other hand, these contradictions are so easily resolved by these same logics. An authentic resolution of these contradictions—a recognition of the sort of time that is operating, and of the various fictions upon which the law relies—would produce a significant move of self-reflexivity in the law that would effectively undo the liberal logics and assumptions upon which the legal system is based. Paradoxically, these cases stand in the law as a radical challenge—and yet they're so easily shut down within the law. Can the law, then, become the site for the pursuit of social justice concerning injustices of the past? It seems important that claimants continue to pursue these cases, insisting on the materiality of the injuries of the past. It also seems important that we pay attention to alternative sites of adjudication—such as literary works—which judge law and culture's relationship to the past, and provide a site from which to theorise law's relationship to history.

List of Cases

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Mabo v Queensland (No 2) (1992) 175 CLR 1
Plessy v. Ferguson, 163 U.S. 537 (1896)
Rosner v. United States 231 F. Supp. 2d 1202, 1208 (S.D. Fla. 2002)
Sandvik v. United States 177 F.3d 1269, 1271 (11th Cir. 1999)
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Notes

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² In Australia, the most prominent case is *Mabo v Queensland* (No. 2), in which the High Court ruled that indigenous land rights survived the acquisition of sovereignty by Britain, and that the previously held doctrine of ‘terra nullius’ was both legally and historically incorrect. Culturally, the historical relationship of both indigenous and non-indigenous Australians to land has been adjudicated in a number of ways, most recently in novels by Kate Grenville (*The Secret River*) and Alexis Wright (*Carpentaria*).

³ A number of reparations claims have been made recently but in this paper I will focus on the case *In re African-American Slave Descendants Litigation* as these cases represent the first substantive legal opinions on reparations in a federal court. For a summary of recent reparations claims and legislative initiatives at local, state and federal levels, see Ogletree 2003. Charles J. Ogletree, Jr. is a Harvard professor and a key figure in the formulation of reparations claims.

⁴ Binder and Weisberg provide a thorough, critical summary of the law and literature movement in their work *Literary Criticisms of Law*. Binder and Weisberg employ a cultural studies approach to draw attention to the similarities between, on the one hand, imagination as a ‘meaning-making function that pervades social life’ (2000: 5), and, on the other hand, law as ‘more broadly ... an ordering function, a process of identifying, allocating and contesting authority, that pervades all spheres of social life’ (2000: 5). In law, as in literature, fiction functions as a device or argument that orders the world.

⁵ In the Australian context, ‘fiction’ became a key term through which to challenge the prevailing legal understanding of Australian law and its relationship to history in the *Mabo* judgment; for example, Chief Justice Brennan held: ‘The fiction by which the rights and interests of indigenous inhabitants in land were treated as non-existent was justified by a policy which has no place in the contemporary law of this country’ (at 42).

⁶ There is a significant body of critical literature which challenges the liberal version of American history and law’s complicity with this narrative—a narrative which is relevant to the reparations cases because, for

example, it produces an abstract understanding of individual will, a strategy which disguises the material realities of racism. See, in particular, Best, Hartman and Spillers.

⁷ For an elaboration of the potential of the consumer fraud argument in the case *In re African-American Slave Descendants Litigation*, see Ramchandani 2003.

⁸ Wenger argues that slavery violated the Takings Clause of the United States Constitution. Using the liberal logic of self-ownership against itself, Wenger argues that when the government made laws that established and maintained slavery, it appropriated the property of self-ownership of the slaves; accordingly, the rightful owners of this property suffered uncompensated takings and so are constitutionally entitled to compensation under the Takings Clause (2003: 192).

⁹ For reparations claims based on unjust enrichment, see Dagan (2003); Posner and Vermeule (2003); and Sherwin (2004). Posner and Vermeule argue that ‘because the victim and claimant do not need to be the same person ... the restitution argument provides a stronger case for reparations than the compensation argument does’ (2003: 703). For a description of the debates concerning unjust enrichment see Sherwin (2004); Sherwin ultimately argues that restitution claims do not carry sufficient ‘moral force’ to carry reparations claims (2004: 1444), being based on principles of ‘revenge’ and ‘retaliation’ (2004: 1465); Sherwin therefore advocates claims based on compensation rather than unjust enrichment (2004: 1465). My concern here is not with technical or ethical debates concerning the desirability of restitution-based claims for reparations, but with legal and cultural ideas of time that led to the failure of the claim in the Supreme Court.

