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The Case against Black Reparations

Richard A. Epstein

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RICHARD A. EPSTEIN*

INTRODUCTION

The legal case for black reparations has been rejected. The political struggle for black reparations continues. The purpose of this short essay is to indicate my views on both the legal and political sides of the current sputtering campaign. Section I talks briefly about some of the legal issues raised by the recent claims for reparations. Section II addresses the political movement, with some reference to events taking place by close to Boston, namely the self-study on the complicity of Brown University in slavery and regulation organized by Ruth Simmons, the President of Brown and herself a black woman of much distinction.[1]

I. THE LEGAL POSITION

Quite by chance, I recently picked up a copy of Boris Bittker's *The Case for Black Reparations*, published in 1973.[2] Its elegant text is obviously dated, but it reflects the open wound that slavery and segregation continued to inflict on American society even after *Brown v. Board of Education*[3] had been on the books for almost twenty years.[4] The memory of *Plessy v. Ferguson*[5] remained

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[1] For an explanation and critique of the Brown study, see Brian C. Jones, *Brown Grapples with its Ties to the Slave Trade*, THE PROVIDENCE PHOENIX, Sept. 24, 2004, *at* http://www.providencephoenix.com/features/top/multi/documents/03790756.asp (last accessed Oct. 4, 2004).

[2] BORIS I. BITTKER, THE CASE FOR BLACK REPARATIONS 7 (1973) (taking what was, especially then, a controversial position).

[3] 347 U.S. 483 (1954).

[4] BITTKER, *supra* note 2, at 19 ("[N]o one who is sensitive to the persistent effects of deep-seated social customs . . . can doubt that the life of blacks in America will bear for decades the scars of a century of discrimination.").

stuck in the craw of this distinguished American liberal whose main area of expertise was taxation and not civil rights or race relations.[6] (The joke at Yale when I was a student was that Bittker, with his relentless intellectual rigor, was able to make his civil rights course resemble his courses in taxation, when most people hoped for the opposite result). In his book, Bittker offers a merciless dissection of the claims for and against judicially-imposed reparations.[7] He makes it clear that he prefers some kind of legislative program, perhaps one modeled on the German compensation program for victims of the Holocaust, which included payments to Israel.[8] He entertains the possibility of bringing action under Section 1983[9] against various officials who had enforced segregation while acting under color of state law.[10] In evaluating the remedial alternatives, Bittker is genuinely troubled about whether the distribution of the cash in a program of reparations ought to be paid to individuals for their personal grievances, or paid over to black organizations for use in promoting various social programs.[11] He is further troubled by the charge that the introduction of a race-specific reparations program could undermine the color-blind norm of state action that animated Justice Harlan's famous dissent in *Plessy*.[12] The pain of past injustices runs very deep.

I mention these materials because the passage of thirty years has not put all of these questions to rest, particularly in light of the recent flurry of action over this question. Bittker's elegant exposition of his case reveals the difficulties that have dogged the various claims for black reparations, all of which Judge

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[5] 163 U.S. 537 (1896).

[6] BITTKER, *supra* note 2, at 13-17 (expounding upon *Plessy's* destructive legacy).

[7] *See generally* BITTKER, *supra* note 2.

[8] *Id.* at 78 (using the German reparations program as a vehicle for analyzing some of the arguments for and against black reparations in the United States).

[9] The relevant language of 42 U.S.C. § 1983 reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (2004).

[10] BITTKER, *supra* note 2, at 30-58 (analyzing whether Section 1983 claims could be brought against individuals or government entities to redress past wrongs, such as segregation, that had once been legally permissible).

[11] *Id.* at 68-86 (articulating the practical differences between making payments to individuals and making payments to organizations).

[12] *Id.* at 107-27 (discussing whether a program of black reparations is constitutional under the Fourteenth Amendment's equal-protection clause); *see also* Plessy, 163 U.S. at 559 (Harlan, J., dissenting) (asserting that "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens").

Norgle firmly rejected recently in *African American Slave Descendants Litigation*.[13] That case addressed the possibility of judicially created remedies,[14] and did not discuss the legislative route that has been used, for example, in the award of limited reparations to the Japanese who were interned in the United States during the Second World War.[15] In this regard, the most impressive feature of the Norgle opinion is that he spent very little time discussing the substantive merits of the individual cases, and instead focused much more on the bewildering array of procedural and constitutional objections to the plaintiffs' cases.[16]

Here I shall consider three of those procedural points: standing, political question, and the statute of limitations. Under received law, Norgle was right to think that each of these obstacles could not be overcome. As a matter of principle, however, I think that the last objection is the only one that works. But in law, generally one good argument is enough, and this argument is indeed sufficient to carry the day. In the course of dealing with that last issue, I will discuss some of the substantive issues that it necessarily raises. These cluster largely about the question of what should be done when the individual perpetrators of past wrongs are beyond the reach of the law, and the plaintiff must ground its claims on a theory of vicarious liability.

A. *Standing*

The initial obstacle to the plaintiff's case was the doctrine of standing,[17] which in its accepted modern form requires that any plaintiff show that his injury is separate and distinct from that of the public at large, and that the harm in question be traceable to some wrongful action of the defendant.[18] In Norgle's view this test was not satisfied when the descendants of past slaves could only state a derivative claim for injuries rather than one personal to themselves. In rejecting a claim for historical injustice, he chided the plaintiffs

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[13] *In re* African-Am. Slave Descendents Litig., 304 F. Supp. 2d 1027 (N.D. Ill. 2004) (rejecting the claims of descendants of slaves who sought relief from private corporations who had allegedly profited from the institution of slavery).

[14] *Id.*

[15] *See, e.g.*, Civil Liberties Act of 1988, 50 U.S.C. app. § 1989 (2004) (apologizing, on behalf of the nation, for "the fundamental violations of the basic civil liberties and constitutional rights" occasioned by the internment of Japanese-Americans during World War II).

[16] *In re* African-Am. Slave Descendents Litig., 304 F. Supp. 2d at 1044-75 (dedicating thirty pages to discussing the standing doctrine, the political question doctrine, and the applicable statute of limitations).

[17] *Id.* at 1044.

[18] *See* Allen v. Wright, 468 U.S. 737, 738 (1984). For its application in a reparations case, see *Cato v. United States*, 70 F.3d 1103, 1109-10 (9th Cir. 1995), which held that a descendant of formerly enslaved African Americans had standing to sue the United States for damages connected with the historical enslavement of African Americans and subsequent discrimination.

for presenting a claim that was "contrary to centuries of well-settled legal principles requiring that a litigant demonstrate a personal stake in an alleged dispute."[19] In this particular case, unlike others, I do not have any deep conceptual objections to the definitions of standing that Norgle applied here. I think that these tests of discrete injury are wholly inappropriate, however, for those claims that seek to enjoin the government from the commission of actions that are ultra vires a particular branch of the federal government. As I have argued elsewhere, the judicial power extends to cases in equity, and one standard tenet of equitable remedies, such as those crafted to deal with derivative actions against the officers of corporations and voluntary associations, is that all members of the relevant class stand in the same position to the wrongdoer, such that one individual may become the virtual champion of the entire group.[20]

In cases that take this form, the object of the lawsuit is to protect against actions – such as the appointment of a national bishop or the refusal to publish the budgets of our intelligence agencies – that may be conducted in violation of structural limitations contained in the Constitution. These violations will go largely unredressed unless one person can bring the case for everyone. The insistence on a separate and discrete injury in these cases necessarily results in an odd truncation of the doctrine of judicial review established in *Marbury v. Madison*.[21] Hence I think that there is a strong case for citizen or taxpayer standing, which means that the chief task for the court is to decide *which* case should be allowed to go forward when multiple challenges are made.

None of the plaintiffs' claims in *African American Slave Descendents Litigation* fall into this class. These actions sought damages for conversion and restitution against private corporations who allegedly profited from the forced labor of black slaves, or from insurance or lending businesses relating to the slave trade.[22] These are not claims for citizen standing which I would allow, even if the current law allowed for citizen or taxpayer standing. Rather, these claims are straight claims for compensation for past wrongs, or for the performance of particular acts, such as opening corporate books to inspection or for an accounting. Whatever the merits of these suits, their form is far from exotic.

Regarding a different justification for denying standing, the damage claims

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[19] *In re* African-Am. Slave Descendents Litig., 304 F. Supp. 2d at 1047.

[20] *See* Richard A. Epstein, *Standing and Spending – The Role of Legal* and *Equitable Principles*, 4 CHAP. L. REV. 1 (2001) (examining how the doctrine of standing has contributed to the expansion of the federal government's spending power by preventing taxpayers from bringing claims based on injury derived from government expenditures); Richard A. Epstein, *Standing in Law & Equity: A Defense of Citizen and Taxpayer Suits*, 6 GREEN BAG 2D 17, 18 (2002) (arguing that standing doctrine should be extended to suits in equity where a citizen seeks to redress conduct that has similarly damaged all citizens).

[21] 5 U.S. (1 Cranch) 137 (1803).

[22] *In re* African-Am. Slave Descendents Litig., 304 F. Supp. 2d at 1039-41.

should *not* be dismissed solely because they are not brought by the persons directly injured but by their descendants. Derivative actions are routinely allowed in other contexts. For instance, the normal action for loss of consortium when brought by the disappointed spouse or child is actually a derivative action because the real victim in the case is the party who was physically injured in the accident.[23] The same could be said about any action for wrongful death brought by a descendant under a tort theory that would have been available to the decedent had he lived.[24]

The plaintiff's cases are sharply distinguishable, moreover, from the full range of tort cases in which standing doctrine does bar actions that might be allowed if the only tools in the defendant's war chest were duty of care and proximate cause. I refer here to situations in which the pollution of public waters is said to generate a cause of action for fishermen, but not for the packers who are dependent on their catch.[25] The defense of the result in these cases is that the inner tier of plaintiffs will satisfy the need for deterrence, so that the huge administrative costs associated with the second tier of actions can be safely avoided.[26] In reparations cases, on the other hand, there is no inner circle of claims that are allowed: all actions for reparations fail even if the standing objection is allowed.

In light of these considerations, it is therefore a real puzzle why standing should be such an obstacle when the case is so similar to those where standing is routinely allowed and so different from those where it is routinely denied. A finding of standing does not announce to the world that the claim is sound. It only signals that the plaintiffs should have the opportunity to show that it is sound, both on the law and the facts. What has happened in this case is little more than a disguised ruling on the merits.

B. *Political Question Doctrine*

The court also dismissed *African American Slave Descendants* for running afoul of the political question doctrine.[27] The court conceived of the doctrine

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[23] *See* RESTATEMENT (SECOND) OF TORTS § 693(1) (1979) (allowing an injured person's spouse to collect for loss of society and services). These claims are usually accepted for spouses, and frequently rejected for children, but on the merits, not on grounds of standing. *See id.* § 707A (rationalizing that the likelihood of duplication of recovery is too great if a minor has a cause of action for injury or death to a parent).

[24] For the earliest of these statutes, see Lord Campbell's Act (Fatal Accidents Act), 1846, 9 & 10 Vict., c. 93 (Eng.) (establishing the right of the spouse, parent, or child of a decedent to pursue a cause of action for wrongful death).

[25] *See, e.g.*, Pruitt v. Allied Chem. Corp., 523 F. Supp. 975 (E.D. Va. 1981) (allowing actions by shop owners and commercial fisherman, while denying them to seafood wholesalers and distributors).

[26] Mario J. Rizzo, *A Theory of Economic Loss in the Law of Torts*, 11 J. LEGAL STUD. 281, 283 (1982) (challenging the view that economic loss is not significantly recoverable at common law).

[27] *In re* African-Am. Slave Descendents Litig., 304 F. Supp. 2d 1027, 1063 (N.D. Ill.

in the standard formulation of *Baker v. Carr*,[28] and reasoned that judicial power is restricted because the entire matter of reparations had been committed to the legislative branch.[29] The basic elements of the political question doctrine have been expressed as follows:

> [1] A textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[30]

I confess a genuine difficulty in seeing how this doctrine should apply. Starting from the top, there is little reason to think that reparations are committed to any other branch of government apart from the judiciary. The usual cases in which the political question doctrine has real legs arise in connection with claims brought by foreign individuals in the United States, when the executive branch, often with Congressional backing, has sought to work out some accommodation with foreign governments and foreign nationals.[31] The argument in these cases is that the domestic litigation works at cross purposes with our diplomatic objectives.[32] Exactly how these two goals should be reconciled is an issue far beyond the scope of this short essay. Regardless of the right resolution, however, I do not think that we should express the political question doctrine as a limitation on the judicial power. If we do, then it is hard to see how that power could ever be conferred, even if the executive branch waived objections to the suit on the ground that the suit did not impede the nation's own diplomatic initiatives. The better way to think of the doctrine is as an exercise of inter-branch comity, which recognizes that

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2004) (considering the political question doctrine defense as an independent basis for dismissing the plaintiff's complaint).

[28] 369 U.S. 186, 208-18 (1962) (outlining the contours of the political question doctrine).

[29] *In re* African-Am. Slave Descendents Litig., 304 F. Supp. 2d at 1053-63 (asserting that each *Baker* factor is grounds for dismissing the plaintiff's complaint).

[30] *Baker*, 369 U.S. at 217.

[31] *See, e.g.*, Anderman v. Federal Republic of Austria, 256 F. Supp. 2d 1098, 1117-18 (C.D. Cal. 2003) (holding that the claims of Austrian Jews against the Austrian government for injuries arising out of Nazi Persecutions in 1938 were nonjusticiable under the political question doctrine); Kelberine v. Societe Internationale, 363 F.2d 989, 995 (D.C. Cir. 1966) (holding that an action against defendant corporation for acts committed in connection with the Nazi persecution of Jews was outside the scope of judicial authority).

[32] *See Anderman*, 256 F. Supp. 2d at 1118 (deferring to the executive branch's power over foreign affairs).

international problems are often better solved by political rather than judicial means, even if it results in the loss of individual claims.

Many of the claims for reparations in which the political question doctrine has been used take place in international contexts. With respect to domestic situations, I am again hard pressed to understand why an ordinary claim for restitution or conversion should be thought of as raising the political question doctrine simply because the matter is politically explosive. No one raised such an objection in *Brown v. Board of Education*,[33] and I see no reason why the reparations issue should be bounced out of court on the ground that it is too hot to handle. One might as well say that all current asbestos litigation should be brought to a halt because Congress is hard at work in a quixotic endeavor to fashion some claim facility that will deal with these issues. Nor is there any difficulty in discovering the underlying legal principles to govern these cases. After all, it is quite permissible at common law to deny a cause of action on the ground that it has been barred by the statute of limitations or that the plaintiff has not pleaded or proven sufficient acts that will allow for a definitive determination of damages. The entire body of law that relates to the indefiniteness of certain promises proceeds on exactly these grounds.[34] It is not as though a court is asked to rule on a declaration of war, or even to act to undermine a compensation scheme already in place. Here again the political question evasion seems to make little sense, and indeed has the appearance of being an opportunistic doctrine used to put aside political hot potatoes that raise standard legal issues.

C. *Statute of Limitations*

The statute of limitations defense, however, seems to be impregnable in these cases. These statutes can raise individual issues of immense complexity, but the basic outlines are tolerably clear. As a basic matter, a statute of limitations has two major purposes.[35] The first purpose is to make sure that the cause of action is brought when the evidence is fresh so that a trial can conclude with tolerable accuracy.[36] Second, and equally laudable, these statutes allow parties to bring to closure past disputes so that everyone can get on with the business of life.[37] These considerations also rationalize the doctrines of adverse possession and prescription developed in connection with claims for real property.[38] In general, the statute of limitations starts to run

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[33] 347 U.S. 483 (1954).

[34] *See, e.g.*, Acad. Chi. Publishers v. Cheever, 578 N.E.2d 981 (Ill. 1991) (accepting an indefiniteness argument when the agreement did not specify the number of stories or date of publication for the unpublished writings of the late author, John Cheever).

[35] *See* United States v. Kubrick, 444 U.S. 111, 117 (1979) (considering the statute of limitations defense with regard to a claim brought under the Alien Tort Claims Act).

[36] *See id.*

[37] *See id.*

[38] See, e.g., Henry Ballantine, *Title by Adverse Possession*, 32 HARV. L. REV. 135, 135

when the cause of action accrues, that is, when plaintiff suffers the harm.[39]

As a first approximation, therefore, the individual causes of action for slavery and segregation accrued when the injuries were inflicted, so that the statutes in question have long run unless some tolling exception applies. Tolling refers to those equitable circumstances that "toll," or stop, the statute of limitation from running. In the simplest case, the statute is tolled during the minority of an individual who lacks the capacity to bring suit on his own behalf.[40] It takes little imagination to accept that the statute should be tolled when the injured person is prohibited by law from bringing any legal action at all, which occurs when a slave is a nonperson. But even if we allow this tolling defense, it only gets us up to around 1865.[41] Much of the wrongs inflicted in the United States took place after the civil war during the period of official segregation.[42] But segregation does not toll the statute of limitations because segregation did not limit the right to bring suit, even if the climate of opinion made it impossible to win on these cases. That happens in countless areas of life. For example, the privity limitation relevant to product liability law once made it impossible for an injured person to sue a remote supplier of goods in New York unless certain limited exceptions applied.[43] Although *MacPherson v. Buick* undid this limitation in 1916,[44] a tort cause of action barred in New York in 1866 could still not be revived fifty years later. The same is true with reparations. The hostile legal climate surrounding a cause of action for reparations, or for anything else, does not prevent the statute from running.

Furthermore, this case is not one where the individual plaintiff does not suffer an injury until years after the defendant has acted. In contrast, in cases where someone inhales asbestos fibers in 2004, under traditional law the plaintiff has a cause of action against the manufacturer who made the fiberboard fifty years earlier.[45] A statute of repose could bar actions based on the number of years since the defendant has parted with possession of the

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(1918) (stressing use of adverse possession as a means to protect sound titles from frivolous suits).

[39] *See* RESTATEMENT (SECOND) OF TORTS § 899 cmt. c (1979).

[40] *See id.* cmt. e (explaining that an injured person's lack of capacity is grounds for tolling the statute of limitations).

[41] *See* U.S. CONST. amend. XIII (abolishing slavery in 1865).

[42] *See* BITTKER, *supra* note 2, at 17 (explaining how slavery was replaced "by a caste system embodying white supremacy").

[43] For a discussion of decisions applying the privity limitation in product liability cases, see *MacPherson v. Buick*, 111 N.E. 1050, 1051-53 (N.Y. 1916).

[44] *Id.* at 1056-57 (overruling prior case law by holding defendant automobile manufacturer liable for injuries sustained by a remote buyer despite an absence of privity).

[45] *See, e.g.*, Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1093 (5th Cir. 1973) (holding that plaintiff insulation worker had a cause of action against manufacturer of products containing asbestos).

dangerous product.[46] This bar, however, is wholly without regard to the time of the plaintiff's injury. Nor is this a case of concealment or of a continuing wrong,[47] apart from the want of redress of the older wrong, which if allowed in any case always makes the statute a dead letter. I think that the statute of limitations defense should be allowed, and that the case should turn on that ground alone, not that of standing or political question.

This result is consistent with the basic theory of the statute of limitations because the passage of time is, in general, a reliable proxy for the increased complexity of events. The correct view of the substantive law allows for the descent of the action to take place on both sides of the case.[48] On the plaintiff's side, each passing year results in the multiplication of the number of descendants to whom some fractional interests have passed. The analogous problem in connection with the possibilities of reverter and determinable fees has resulted in a number of legislative and private initiatives whose purpose is to cut down these actions because of the huge number of parties involved.[49] Thus a legislature could require that individuals reregister their interests to keep their interests alive,[50] or the legislature could require the creation of trustees who are allowed to proceed on behalf of all parties. But no such mechanism is available here, so that we see with each passing year the numbing difficulties of trying to figure out who is a descendant of whom, and to what fraction.

This seems to make the class action approach difficult if we were to aggregate the individual claims, where each claim is dubious in itself and differs in some particulars from the others. In the years since 1865 we have had at least seven generations, so that a direct descendant of a slave is 127 parts not slave descendant, unless there is another slave somewhere else in his or her line of ascent. The truncation worked by the statute of limitations prevents these reparations actions from lasting for more than a single

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[46] *See* RESTATEMENT (SECOND) OF TORTS § 899 cmt. g (1977).

[47] *See id.* cmt. d, e (describing procedures for calculating the statute of limitations for cases of continuing harms or for harms where the plaintiff is not aware of the injury until long after the injury has occurred).

[48] For a more complete statement of my views on this issue, see Richard A. Epstein, *Against Redress*, DAEDALUS, Winter 2002, at 39, 42-44, which examines the difficulties in determining who should receive compensation, and who should pay that compensation, in a program to redress inequalities born from past practices.

[49] For a discussion of the problem, see *Brown v. Independent Baptist Church of Woburn*, 91 N.E.2d 922, 924 (Mass. 1950), which held that a person can create a determinable fee outside the time limits otherwise imposed by the Rule Against Perpetuities. The fragmentation of interests that resulted from this decision is reported in W. Barton Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 HARV. L. REV. 721, 741-45 (1952).

[50] For a discussion of the requirement of rerecordation of mineral interests, see *Texaco, Inc. v. Short*, 454 U.S. 516 (1982), which upheld the constitutionality of an Indiana registration law.

generation. To circumvent this problem, we have to contrive of some class-wide payment that goes to no one in particular, but to entities who are said to represent these individuals. But at this point, why think of the claim as one for reparations when the program looks far more like some legislative initiative that does not have to observe the standard constraints of corrective justice, but simply has to command sufficient political support to pass.

Similar difficulties exist on the side of the defendant. Let us assume that the claim really does ask for an accounting of profits that were achieved by using black labor, by selling insurance on slaves, or by making loans to purchase slaves. We have no idea how much of that profit (assuming that it could be calibrated) actually descended to the next generation. The ordinary business will reinvest some fraction of its profits, but will declare some as dividends and pay some out in salaries to its employees. Dividends and wages do not descend to the next generation. Hence it becomes necessary to figure out just how much of the current worth of any firm is related to these distant events, as opposed to those of more recent vintage that were conducted on a far larger scale. Any calculation that takes interest at just 2% of the full profits, or even some fraction thereof, improperly ignores the distributions and consumption that cause this action to fail.

The numbers generated by faulty calculations are orders of magnitude too high. Think of the matter this way: $100 invested in 1865 at 2% interest compounded annually equals $1600 140 years later. But if one allows a bit for inflation and does the calculations at 5%, then we are at $92,500. Those numbers increase exponentially to $11,589 for profits invested in 1765 at 2%, and to $12,173,957 for that same $100 invested at 5% interest. These calculations would suggest that huge fractions of the net worth of the targeted firms, if not their entire value, is attributable to the slave trade, until it is remembered that the same dubious calculations could be used to attribute the full net worth of the firm to virtually all of its other activities as well. None of these calculations are accurate because they all assume that all earnings were retained and invested, which does not happen anywhere. The use of a statute of limitations truncates these inquiries to a smaller number of years where it is possible to actually trace the dollars in question through specific transactions, instead of relying on some general statement that X institution was engaged in some activity that allowed it to profit from slavery.

In this regard, it is instructive to note that the most common cases in which the statute of limitations is tolled are those that seek the return of specific works of art taken from their owners during the Holocaust or some other cataclysmic event.[51] But these claims present none of the difficulties associated with the claims for reparations. First, with art claims there is a genuine case for denying the operation of the statute of limitations, for even

[51] *See, e.g.*, O'Keeffe v. Snyder, 416 A.2d 862, 869-73 (N.J. 1980) (holding that in an action for replevin of artwork, the statute of limitations is not triggered until the plaintiff knows, or should have discovered, those facts which form the basis of the claim).

though the plaintiff knows that a wrong is committed, it may be impossible to figure out by whom, especially for art not on public display.[52] Second, there is no valuation problem involved in these cases because the art work remains (precisely because it is art) in its original condition, give or take a few levels of dirt or varnish.[53] And third, the plaintiffs almost always seek only the restoration of the art in question, not recovery for the fair rental value of the art work for the many years that it was in the hands of others.[54] These underlying claims are much more focused than those for reparations, and the remedy demanded is far more limited.

In sum, the decision in *African American Slave Descendants* offers a full range of reasons for denying claims for reparations. As a descriptive matter, I think that courts will eagerly embrace all of the reasoning in that decision in order to rid themselves of cases from which they can see no good coming. As a normative matter, I think that the case is rightly decided on the prosaic grounds of the statute of limitations. I would prefer to see the matter left right there on the ground that we could then avoid making bad law on other issues that could spill over into cases that have little or nothing to do with reparations, or which do not present any major time issue. That said, recall that the statute of limitations only bars a legal right of action. It does not determine that no right has ever existed; it is thus hornbook law that money owed which is paid over voluntarily after the expiration of the statute of limitations cannot be recovered, even if a suit for that same sum could be effectively resisted. For the same reason, the running of the statute of limitations does not block nonjudicial responses to the underlying problem. The view that I have taken of the case therefore fairly invites consideration of how these matters ought to proceed once litigation against all public and private defendants is out of bounds. It is to that question that I next turn.

II. THE POLITICAL DIMENSION

The elimination of all legal avenues of relief will, we can be confident, place great emphasis on political efforts to achieve the same results. These efforts will in turn take place in two distinct arenas. First, there will be efforts to induce the Congress of the United States, and perhaps even individual states, to make reparations or apologies, perhaps on the model that was done with respect to the Japanese who were inexcusably interned during World War II.[55] Second, there will be efforts to reach private parties whose operations were tainted by slavery, segregation, or both, just as in *African American Slave Descendants*. I think that the political efforts at compensation will go nowhere, but may engender a fair bit of bitterness along the way. The private

[52] *See, e.g., id.* at 865-66 (explaining that the plaintiff artist did not know the identity of the thief who stole her artwork from a private gallery).

[53] *See, e.g., id.*

[54] *See, e.g., id.* at 864.

[55] *See, e.g.*, Civil Liberties Act of 1988, 50 U.S.C. app. § 1989 (2004).

efforts will produce stranger results, as the new initiative of Brown University is likely to show. Here are some of the particulars.

In dealing with efforts to obtain compensation from governmental entities, the first puzzle is why the primary action takes place at the federal level. Here the obvious culprits were the Southern states who practiced slavery until 1865 and perhaps some of the Northern states which had abolished it at some earlier time. With respect to claims against the states, an obvious point is that we do not have to enmesh in struggles those states that entered the Union only after 1865 and thus had no part in any of the earlier practices (except perhaps as territories, which is a complication that I shall happily skip). But here it takes a major effort to remove any of the symbols of the old confederacy, and it seems likely that resistance to any reparations program will be the fiercest in those situations where the case for action is likely the strongest. It is, however, easy to see that those who still bear grudges for the "War of Northern Aggression" will be ill-disposed toward such claims, while the recent arrivals to these states will think it odd that they are taxed for actions done by others long before they arrived. The situation will get only more complicated because other groups that believe that they have fair grievances, such as for the horrible treatment given to Chinese immigrants to the United States,[56] will wonder why they are classified as wrongdoers and not victims. It is just not possible to achieve these efforts one state house at a time.

So we think about nationwide claims, but these too are in turn subject to real difficulties. Over 300,000 northerners, many of whom were black, were killed during the Civil War in the successful effort to end slavery.[57] Their descendants could think that they have paid reparations in blood and do not wish to go further. Next to them stand vast numbers of individuals who regard themselves as wholly unrelated to the wrongs in question and are asked to foot some fraction of the bill, while their own grievances remain largely unredressed. Such is the difficulty whenever a claim to reparations appeals to some principle of vicarious liability. All claims for vicarious liability necessarily affect individuals who were not responsible for the wrong in question: think only of the operation of the law of vicarious liability in tort.[58] But in many cases vicarious liability is tolerated on the ground that the liability in question has some efficiency justification, such as the reduction of accidents that would otherwise take place.[59] Vicarious liability is often approved

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[56] For two illustrations of the problem, see *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (challenging discriminatory rules for laundry permits), and *Jew Ho v. Williamson*, 103 F. 10 (N.D. Cal. 1900) (striking down sham quarantine law that applied only to the Chinese).

[57] The United States Civil War Center, *Statistical Summary: America's Major Wars*, *at* http://www.cwc.lsu.edu/cwc/other/stats/warcost.htm (accessed Oct. 4, 2004).

[58] *See* RICHARD A. EPSTEIN, TORTS § 9.9-9.11 (1999); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 69 (5th ed. 1984).

[59] *See generally* Alan O. Sykes, *The Economics of Vicarious Liability*, 93 YALE L. J. 1231 (1984) (evaluating whether economic principles justify vicarious liability).

because it eliminates the need to prove the negligence in hiring or supervision that was present in the particular case.[60] But here there is no efficiency peg on which to hang the reparations claim, so that hordes of indignant taxpayers will rise forward asking, "why should my tax dollars go to compensate for wrongs that I did not commit?"

The second problem arises on the plaintiff side of the equation: Who should get the dollars in question? Any state-wide program is haunted by the problem of migration, which makes it likely that much of the cash would go to the wrong people. But even at the national level, the situation is a lot different from when Bittker wrote about these matters back in 1973. There have been generalized programs of affirmative action and special education, so that the open wound left by *Plessy* has healed somewhat, except in the eyes of those who are determined to keep any scab from forming. A program of reparations could easily take into account collateral payments, which is done of course in connection with the 9/11 compensation program.[61] The United States has committed huge remedial resources for affirmative action programs and for general social welfare programs to aid the needy, and there is no doubt that a substantial fraction of those expenditures have gone to help individual African Americans. Do these programs count as reparations when they were originally understood as social welfare measures? Do they count as a credit against any reparation claim that could be asserted? The answer is hard to say, one way or the other. But unless someone comes up with a convincing explanation of why all the positives since 1954 should be disregarded, the claims for reparations will stall on the obvious ground that many political steps have already been taken in that direction. It would be a tragedy of national proportions if claims for reparations to all or some blacks were to interfere with other programs that tend in the same direction but lack such a divisive social quality. There is too much water over the dam for this reparation claim to have any traction, even in a Democratic administration. There is much that could be done in individual cases, such as when President Clinton apologized to the human subjects who were mistreated at Tuskegee.[62] But the most likely upshot is that the

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[60] *See* EPSTEIN, *supra* note 58, at 238.

[61] *See* Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230 (2001) (codified at 49 U.S.C. § 40101 (2004)) (authorizing a compensation program for air carriers and individual victims in the wake of the September 11th terrorist attacks). Title IV of the Act, captioned "Victim Compensation," creates the September 11th Victim Compensation Fund of 2001. *Id.* § 401-09, 115 Stat. at 237-241. Section 403 of the Act provides that the object of Title IV is "to provide compensation to any individual (or relatives of a deceased individual) who was physically injured or killed as a result of the terrorist-related aircraft crashes of September 11, 2001." *Id.* § 403, 115 Stat. at 237. The statute was upheld against multiple constitutional challenges in *Colaio v. Feinberg*, 262 F. Supp. 2d 273 (S.D.N.Y. 2003).

[62] *See* President William J. Clinton, Remarks by the President in Apology for Study Done in Tuskegee (May 16, 1997) (transcript available at http://clinton4.nara.gov/textonly/New/Remarks/Fri/19970516-898.html).

arguments for reparations will be used as bargaining chips to maintain the level of affirmative action programs that were found to meet a compelling state interest in *Grutter v. Bollinger*.[63]

The next question is whether there is any chance that reparations claims could be addressed to private parties. Here it is an open secret that just about every major private institution in the United States fears the tarnish to its good name that comes from a credible assertion that it is racist.[64] I think that corporations are often so timid in how they proceed on these questions because they fear that any revelation of improper conduct will result in a massive loss of good will and increased levels of regulation from Congress. They will not be willing to undertake *mea culpas* that look to the past and ignore all that they have done on affirmative action and similar topics for the last forty or so years. I do not think that we should ask the various corporate defendants who were unsuccessfully sued in *African American Slave Descendants* to make endless *mea culpas*, for to do so is to start down a road that has no endpoint at all. In addition, I don't think that it will be easy to shame these corporations into making such declarations in the absence of specific proof of recognizable wrongdoing to identifiable persons. The most that can be expected are bland declarations that X company has been a good corporate citizen that is responsive to African American interests in the communities that it serves. But we get that right now, even from Wal-Mart. The upshot is that the reparations campaign will continue to sputter along. It may generate a few more contracts, jobs, and grants than before, but it will not crystallize into any political groundswell.

The situation with Brown University and its striking initiative is quite different. Non-profit organizations with liberal constituencies and University Presidents can do things that larger corporations must shy away from. In my view, Brown is wholly within its rights as a private institution to conduct whatever internal investigation that it chooses into its own past and to initiate whatever corrective program that it chooses. It is all the more admirable because this particular move is not made in response to any external efforts. I am happy, however, that as a member of the faculty at the University of Chicago, founded in 1891, I will not have to face the prospect of such a hearing. My fear is that such efforts will come to little good.

The first point to note is that the initiative starts on the wrong foot. The emphasis is too introspective. Ruth Simmons may be worried about explaining to herself that her great-grandparents were slaves. She should relax, or at least keep Brown out of it. The true story, moreover, is all to the good, for it

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[63] *See generally* 539 U.S. 306, 327 (2003) (outlining the criteria that must be satisfied to sustain an affirmative action program).

[64] *See generally* Steven A. Holmes, *Size of Texaco Discrimination Settlement Could Encourage More Lawsuits*, N.Y. TIMES, Nov. 17, 1996, at A20 (asserting that, "consumer-oriented corporations can be [vulnerable] to bad publicity and outside pressure as they deal with employee accusations of racial or sexual bias").

highlights the enormous capacity of the United States to correct for its past wrongs through a tortuous political process. How many other nations can claim that members of a despised minority of one generation can see their great-grandchildren rise to join its social elites? One only hopes that the Brown program will give due credit to that enormous transformation as part of its larger engagement with the issue. But here I fear that this will not happen. The announcement made to the Brown community notes that President Simmons asked the committee "'to organize academic events and activities that might help the nation and the Brown community think deeply, seriously, and rigorously about the questions raised' by the emerging national debate over slavery and reparations."[65] It notes further that "[a]t the time of Brown's founding, Rhode Island was the epicenter of the North American slave trade,"[66] which seems odd given the prominence of Charleston, South Carolina in that business in 1764, the year of the founding.

It is fine to sponsor lectures on an issue that should be discussed and debated anyhow. But the entire committee process suggests that Brown is to some extent complicit in these activities and ought to do something to purge itself of the wrong. To me, that course of action is a mistake, for the business of universities is teaching and research, and I just don't believe that actions that concentrate on the Rhode Island slave trade will have such results. The great fear is that the efforts at absolution will magnify the relative level of wrong and understate the powerful forces at Brown and elsewhere that opposed slavery in all its forms and worked fearlessly and with great effort to stop its activities. It is worth remembering that there was no single national position on slavery during the period of its existence. In our efforts to give prominence to the institutions that supported slavery, there is the danger that we shall overlook the individuals who were able to bring the issue to a halt.

So why do we have these efforts at self-examination? Here I think that they say as much about the present as they do about the past. Until the passage of the Civil Rights Act of 1964, the Civil Rights Movement marked the single most heroic achievement of the American past. Its great accomplishment was to make sure that all individuals had equal rights and liberties under law. That is a result that can be applauded by people of all political persuasions, and it does us well to remember that it took the better part of two centuries to end practices that were unalloyed disasters. But since 1965 the Civil Rights Movement has suffered from "the March of Dimes" problem. Once you have rid the nation of polio, what do you do for an encore? The civil rights equivalent is that the fall of segregation ended the struggle against obvious human rights violations. In its place came complex debates over

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[65] Letter from James T. Campbell, Chair, Brown University Steering Committee on Slavery and Justice, to the Brown Community (Mar. 13, 2004), *at* http://www.brown.edu/Research/Slavery_Justice/community_letter.html (accessed Oct. 4, 2004).

[66] *Id.*

antidiscrimination laws, affirmative action programs and the like. The old allies could no longer hold together the coalition, for some people believed in the colorblind principle and opposed affirmative action, while others (like me) believed in the importance of liberty and private voluntary associations, and accepted affirmative action but were hostile to the enforcement of many of the civil rights laws as an unwarranted limitation on freedom of contract. Brown, it should not be forgotten, took a heroic but futile role in its modest attack on Title IX,[67] involving matters of sex discrimination in interscholastic sports.[68]

Against this fractured background, we can see in the movement for reparations more of a political than a financial cause. It is an effort to reinvigorate the old struggle for civil rights by appealing to an issue on which it is possible once again to assert a profound moral unity. But this campaign to relive the present through the past will surely fail. We do not face slavery or segregation. There is no support anywhere in this nation for a return to either practice. The effort to place reparations front and center ignores that time has shifted the locus of our current concerns to a new set of issues that will not be resolved by reliving the horrors of an early generation in some collective or official capacity. We have to live life going forward. We cannot make collective amends for all the wrong in the past. But we can create new and unnecessary hurts by trying to remedy past wrongs. A divisive campaign for reparations will undercut the efforts that we all want to make a stronger, more vital, more productive and more caring nation.

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[67] Education Amendments of 1972, 20 U.S.C. §§ 1681-88 (2004) (providing that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance").

[68] *See* Cohen v. Brown University, 101 F.3d 155, 161-62 (1st Cir. 1996) (finding that Brown University discriminated against women in the operation of its intercollegiate athletics program in violation of Title IX). For my denunciation of Title IX, see Richard A. Epstein, *"Just Do It!" Title IX as a Threat to University Autonomy*, 101 MICH. L. REV. 1365 (2003).