Civil Rights

An End, or Prelude, to Further Litigation in the Reparations Movement?

*By Douglas G. Smith**

For decades there have been efforts to obtain reparations for the descendants of those held in slavery in the United States. At bottom, the argument for reparations is premised on notions of fundamental fairness: descendants of slaves should be compensated for work their ancestors performed under compulsion. Advocates of reparations note that there have been payments to other groups for past wrongs, such as compensation paid to Japanese-Americans interned during World War II, arguing that it is only fitting that similar measures be taken to compensate the descendants of slaves.

The arguments on the other side, however, are likewise based on such principles. Critics of the reparations movement question why those who had no hand in the institution of slavery and did not directly benefit from it should be forced to pay compensation to those who were never slaves themselves. They question why recent immigrants, for example, should be forced to bear the burden of compensating the descendants of individuals who were held in bondage long before they arrived in this country. And some argue that reparations have already been paid in the form of affirmative action and other programs that have benefited African-Americans; thus any debt owed to descendants of slaves has been paid in full. Finally, they note that there are problems inherent in determining who should receive the benefits of such reparations, and that the entire concept of reparations can be racially divisive.[1]

Such debates have played out in the political arena, accompanied by proposals for legislation that would implement steps ranging from studying the effects of slavery to providing direct monetary compensation to the descendants of slaves.[2] These efforts have thus far failed to bear fruit. While local authorities have taken steps to expose the alleged involvement of corporate America in the slave trade through ordinances requiring companies to disclose any such ties, on the national level there has been no political consensus to award reparations to the descendants of slaves.

Having failed to achieve their goals in the political arena, the advocates of reparations have turned to the courts to seek compensation from companies they allege to have benefited from slavery. Indeed, the proponents of reparations themselves often see such suits as an extension of the overall effort to obtain a political resolution of the reparations issue. However, these lawsuits have run into bedrock principles of law that have been evoked to establish that such claims are not appropriately resolved in the courts.

A recent decision issued by the United States District Court for the Northern District of Illinois, *In re African-American Slave Descendants Litigation*, represents the latest chapter in the reparations debate.[3] Beginning in 2002, plaintiffs claiming to be descendants of slaves filed several lawsuits in federal and state court seeking compensation from a variety of corporations they maintained had benefited from the institution of slavery. Plaintiffs named as defendants, for example, various financial companies whose predecessors had allegedly made loans to slave traders or slave owners and collected customs duties on ships engaged in the slave trade. Similarly, they sued various railroads whose predecessors allegedly used slave labor to construct or run their rail lines. Finally, they named insurance entities whose predecessors had allegedly insured ships utilized in the Trans-Atlantic slave trade or underwritten insurance policies for slaves.

Not only did plaintiffs claim that these companies unjustly benefited from slavery, but they also alleged that the conduct of their predecessors contributed to various current social inequities. For example, plaintiffs cited disparities in the poverty rate between African-Americans and whites, disparities in life expectancies, disparities in incarceration and application of the death penalty, disparities in income and education, and disparities in the likelihood of having a father at home as continuing effects of the institution of slavery for which the corporate defendants were directly responsible.[4]

In late 2002, the Judicial Panel on Multidistrict Litigation consolidated these cases before Judge Charles Norgle for coordinated pretrial proceedings. Plaintiffs filed a consolidated complaint asserting various legal theories, ranging from conspiracy, unjust enrichment and civil rights violations to consumer fraud and intentional and negligent infliction of emotional distress. The defendant corporations immediately moved to dismiss these claims on a variety of legal grounds.

From the very beginning, the political nature of the case was evident. The lawsuit received significant public and media attention. Local activists "mobiliz[ed] African Americans to fill local courtrooms during hearings in the case," and held multiple press conferences at the courthouse, arguing that the lawsuit was "the most important case ever."[5]

In discussing the case, plaintiffs and their representatives made clear their political objectives. Plaintiffs' counsel recognized that their case was inconsistent with established precedent, and would be dismissed. They attributed this to the view that the judge "was always expected to 'maintain the status quo,'"[6] and asserted that legal change could be wrought by continuing to file lawsuits.[7] As plaintiffs' counsel told the press, "legal and political battles must go hand in hand."[8]

Accordingly, reparations advocates stated that, "[t]his issue is much bigger than the court," that "[t]he bigger issue is the mass mobilization of the communities around the demands for reparations," and that "[c]ourt is a tactic employed to help widen the support necessary in order to reach a common goal."[9] Supporters of the lawsuit thus explicitly tied it to efforts to enact a "congressional bill to study reparations" and "a grass-roots mass-mobilization that will culminate at the 10th Anniversary

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of the Million Man March."[10] As one legal commentator observed, "'[t]he litigation, by bringing public attention to the reparation issue, can create pressure and momentum for a legislative solution, like we saw with the tobacco cases and other mass-tort suits.'"[11]

Consistent with the political nature of the case was the proponents' attempts to influence and then discredit the chief decision-maker, Judge Norgle. Plaintiffs, for example, sought to recuse Judge Norgle on the ground that (among other things) he had stated during his confirmation proceedings twenty years earlier that judges should exercise restraint and not exceed their constitutional powers.

When Judge Norgle ultimately dismissed their lawsuit, plaintiffs' supporters publicly "denounced [his] ruling as the product of the 'conservative right-wing judicial, political, decision-making." Indeed, plaintiffs' counsel alleged that the Judicial Panel on Multidistrict Litigation had purposefully "hand picked… one of the most conservative judges they could find to hear this case."[12] Supporters of the lawsuit asserted that "'Judge Norgle is just a liar, he is exercising his political ideology. … His eyes are the eyes of a racist."[13] They claimed that his ruling was "'a very good illustration of the injustice we have suffered for more than 400 years, the total disregard for the humanity of anyone.'"[14] And they asserted that Judge Norgle dismissed their claims because he was simply an "'arrogant, racist, white judge.'"[15] In sum, when the court failed to rule in their favor, the supporters of the lawsuit sought to try their case in the court of public opinion by de-legitimizing the proceedings—even though they seemed to acknowledge that their case was inconsistent with established legal precedent.

Judge Norgle had given the plaintiffs several opportunities to prove their claims, granting multiple extensions and allowing plaintiffs leave to file a second amended complaint after initially dismissing their claims without prejudice. In the end, the court determined that no amendment could cure their complaint, which flew in the face of "numerous well-settled legal principles."[16]

At bottom, the court held, the lawsuit was a political dispute best resolved within the representative branches of government. As the court observed, the suit was part and parcel of "a present and ongoing social and political movement for slave reparations in America."[17] Such disputes, the court found, are more properly resolved by the representative branches: "The specific problem with bringing this issue before a court is that courts are equipped for, and charged with the responsibility of, 'dealing with claims by well-identified victims against well-identified wrongdoers.'"[18] That was far from the case with respect to plaintiffs' claims, which sought recovery for historical wrongs that occurred over a century ago. Indeed, courts have routinely dismissed similar reparations claims.[19]

In analyzing the plaintiffs' complaint, the court concluded that several established legal doctrines bar such claims. First, the plaintiffs lacked standing to bring suit. The Supreme Court has made clear that satisfying Article III's "Case" or "Controversy" requirement is a fundamental prerequisite to bringing suit in the federal courts. This requirement "limit[s] the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process."[20] In addition, it ensures that the judiciary "will not intrude into areas committed to the other branches of government."[21]

To demonstrate standing to bring suit, a litigant must "establish that he has a 'personal stake' in the alleged dispute, and that the alleged injury suffered is particularized as to him."[22] The court observed that this requirement is a "bedrock principle in our system of law" that simply cannot be met in a suit asserting "generalized grievances."[23] "Without the doctrine of standing, 'the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions.'"[24]

The court held that these fundamental requirements of justiciability are simply not met in the reparations context. The plaintiffs seek damages for harms to other individuals that occurred more than a century ago. They simply do no have the "particularized" interest in the outcome of the litigation sufficient to confer standing. Moreover, the relationship between the defendants and the alleged harm is tenuous at best. The defendants did not create the institution of slavery. Nor are the "benefits" they allegedly received from slavery particularly apparent. Many of the defendants were merely alleged to have engaged in business with other individuals who were engaged in the slave trade or who owned slaves. The requisite causal nexus between the defendants' actions and the alleged harm is therefore absent. Rather, even if such alleged injuries could be the basis for a suit, plaintiffs could not allege that the defendants as opposed to third parties not before the court actually caused the injuries for which they seek recovery.

Plaintiffs attempted to avoid these arguments in a number of ways. They asserted, for example, that certain plaintiffs were actually enslaved themselves during the twentieth century. Not only were these claims highly questionable, but these plaintiffs could not allege that the particular corporate defendants they had sued actually had anything to do with their alleged enslavement. Similarly, plaintiffs claimed that the defendants had somehow "misled" them by failing to disclose their links to slavery and that such alleged misrepresentations were actionable under various state consumer protection laws. But they did not allege how these claimed misrepresentations actually injured them. The court concluded that these arguments were without merit: "To recognize Plaintiffs' standing in this case 'would transform the federal courts into no more than a vehicle for the vindication of the value interests of concerned bystanders.'"[25]

Second, the court held that the suit was prohibited by the political question doctrine articulated in *Baker v. Carr*.[26] Under this doctrine, questions that are more appropriately addressed by the representative branches of government are non-justiciable. While plaintiffs argued that the doctrine had no applicability because they were bringing claims as private individuals, the court observed that the case law recognized no such distinction. Indeed, the court observed, the doctrine was routinely applied to bar such claims.[27] Thus, for example, claims for reparations brought by private litigants against corporate defendants for their role in Nazi war crimes have been rejected as non-justiciable under the political question doctrine.[28] The

distinction plaintiffs advocated is simply inconsistent with established precedent, and indeed would eviscerate the political question doctrine.

In holding that the political question doctrine barred plaintiffs' claims, the court reasoned that judicial resolution of such questions would invade the powers of the Executive and the Legislature. In particular, the court noted, the representative branches had already considered the appropriate remedies for former slaves during the Civil War and Reconstruction periods. Instead of authorizing reparations, these elected branches chose to establish programs run by the Freedman's Bureau to assist newly freed slaves, enact civil rights legislation such as the Civil Rights Acts of 1866, 1870, 1871 and 1875, and amend the Constitution by enacting the Thirteenth, Fourteenth and Fifteenth Amendments, abolishing slavery and guaranteeing certain fundamental rights, including the right to vote, to all citizens equally. All of these efforts were designed to "ensure the liberty of the newly freed slaves and benefit them generally."[29] The court observed that proposals to study reparations continue to be introduced in Congress. Yet, the Legislature has made a conscious decision that such remedies would be inappropriate. Accordingly, any action by the Judiciary would by necessity impermissibly intrude on the policy choices made by the representative branches.

Third, the court held that the various counts in plaintiffs' complaint simply did not state a viable cause of action. One of the primary reasons plaintiffs' allegations were legally insufficient was that they did not identify any acts by the defendants that resulted in actual profiting from slavery. Plaintiffs therefore failed to establish the causal nexus between their alleged injuries (or those of their ancestors) and the defendants' conduct. The court found that "[p]laintiffs seek to hold Defendants liable for an entire era of history simply because their alleged predecessors were purportedly doing business in nineteenth century America."[30] The failure to make a connection between the defendants' conduct and the alleged injury independently warranted dismissal of the plaintiffs' complaint.

Finally, the court held that plaintiffs' claims were barred by the statute of limitations. As the court observed, the prohibition on bringing stale claims "can be traced back to early Roman law" and is a fundamental feature of our legal system.[31] It serves important policy goals of ensuring the accuracy of judicial results and giving potential defendants certainty that they will not be held liable for conduct that occurred in the distant past. These principles apply with particular force in the reparations context where plaintiffs seek to recover for conduct that occurred over a century ago.

Given that their claims were plainly time-barred, plaintiffs attempted to argue that they should be excused from complying with the statute of limitations based on several theories. Plaintiffs argued, for example, that slaves were not aware of the defendants' role in the wrongs done to them and therefore could not have brought suit for reparations at an earlier time. But, as the court observed, slaves certainly were on notice of the fact of their injury. Indeed, the record demonstrates that in the early twentieth century, former slaves actually brought claims for reparations.[32]

The court likewise rejected plaintiffs' assertion that there was a continuing violation that would allow plaintiffs to avoid the statute of limitations. While plaintiffs alleged that they continued to suffer the adverse effects of slavery, the court observed that this constituted a "continuing injury" from events that occurred long ago, rather than a "continuing violation."[33] Accordingly, there simply were no new and recent wrongful acts that could provide a basis for a claim that was not time-barred.

Finally, the court rejected plaintiffs' claim that the defendants should be equitably estopped from invoking the statute of limitations because they allegedly "concealed" evidence of their involvement with slavery, which would have put plaintiffs on notice of their claims. Again, the court observed, plaintiffs' injury was not concealed. The alleged injury was apparent early on. Accordingly, the requirements for equitable estoppel were plainly unmet.

On appeal, the district court's broad ruling was largely affirmed. The Seventh Circuit focused primarily on plaintiffs' lack of standing. It agreed with the district court that "[i]t would be impossible by the methods of litigation to connect the defendants' alleged misconduct with the financial and emotional harm that the plaintiffs claim to have suffered as a result of that conduct."[34] Rather, there was "a fatal disconnect between the victims and the plaintiffs" given that "the wrong to the ancestor is not a wrong to the descendants."[35] For those who brought claims on behalf of the estates of former slaves, the court ruled that even if such plaintiffs had standing to sue because they purported to represent the actual victims of slavery, their claims were barred by the statute of limitations. The only claims that the court allowed to proceed were claims brought pursuant to state fraud and consumer protection laws on the theory that plaintiffs would not have bought defendants' products if they had known of their involvement with slavery. Even here, however, the court did not opine "on the merits of the consumer protection claims," but merely sent them back to the district court for further proceedings.[36]

Despite its recognition of the "generally acknowledged horrors of the institution of slavery," the district court's decision represents a powerful illustration that our legal system does not provide a remedy for every wrong.[37] While the court recognized that the institution of slavery was profoundly immoral, that fact alone did not provide a basis for a legal action. Indeed, the court recognized, "slavery seems to have been a part of human history since the 'dawn of civilization.'"[38] It was "an established legal institution" in the United States that had the official sanction of the federal and state governments and was only abolished through constitutional amendment.[39]

Moreover, the court observed, there are equitable considerations on both sides of this question that make it unclear that reparations would be an appropriate remedy for these historical wrongs. The country paid a heavy price to finally eradicate the evils of slavery. "Generations of Americans were burdened with paying the social, political, and financial costs of [the] horrific [Civil] War" that ended slavery and established "citizenship and equality under the law" for those who had suffered under this oppression.[40] Thus, the court concluded: "The sensitive ear has heard. . . the historic apologies in words

and deeds from persons of good will for the evils of slavery."[41]

Advocates of reparations are likely to be undeterred by decisions such as *African-American Slave Descendants.* Indeed, while the case was pending, another class action lawsuit was filed seeking reparations from, among others, President Bush, several foreign nations, and Pope John Paul II.[42]

Endnotes

1 *See* Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 Colum. L. Rev. 689, 702 (2003).

2 *See, e.g.,* H.R. 3745, 101st Cong. (1989); H.R. 40, 108th Cong. (2003); H.R. 40, 107th Cong. (2001).

3 375 F. Supp. 2d 721 (N.D. Ill. 2005).

4 *See* Pl. Second Am. Cmplt. ¶ 41 & n.1.

5 Moushumi Anand & Robert Mentzer, *Federal Judges Hears Arguments in Reparations Case*, Chi. Defender 2 (Sept. 28, 2006); Mick Dumke, *Power To His People*, Chicago Rep. 8 (Dec. 1, 2003).

6 Rudolph Bush, *Slavery Suit Is Dismissed for 2nd Time: Federal Judge Denies Bid For Reparations*, Chi. Trib. 1 (July 7, 2005). *See also* Editorial, *Reparations Debate Advances to More Appropriate Venue*, Chi. Sun-Times 43 (Jan. 28, 2004) ("'No one was under any illusion on how the judge would rule,' said former Attorney General Roland Burris in his capacity as adviser to reparations lawyers.").

7 For example, Diane Sammons, one of the plaintiffs' attorneys "point[ed] out that Japanese-American reparations supporters suffered several courtroom defeats before the U.S. government authorized a $20,000 tax-free payment to every surviving Japanese American interned in camps during World War II." Curtis Lawrence, *Ghosts of Slavery Haunt Court Fight: Judge to Decide Fate of Class Action Reparations Suit*, Chi. Sun-Times 7 (Jan. 25, 2004). Accordingly, even before Judge Norgle ruled, reparations advocates stated that "even if the lawsuit being heard by Norgle is dismissed, more are likely to follow." *Id.*

8 Rudolph Bush, *Slavery Suit Is Dismissed for 2nd Time: Federal Judge Denies Bid For Reparations*, Chi. Trib. 1 (July 7, 2005).

9 *Defendants to Argue for Dismissal of Reparations Lawsuits*, Chi. Defender 2 (Jan. 26, 2004).

10 Natasha Korecki & Fran Spielman, *Judge Says No To Reparations: Tosses Suit Against Firms Over Slavery, But "Fight Will Continue,"* Chi. Sun-Times 8 (July 7, 2005) (quoting Conrad Worrill, Chairman of the National Black United Front).

11 Rinker Buck, *Federal Judge in Chicago Dismisses Slavery Reparations Lawsuit*, Hartford Courant (Jan. 27, 2004).

12 Demetrius Patterson, *Plaintiffs Representing Descendants of Enslaved African Americans File Appeal on Dismissed Reparations Lawsuit*, Chi. Defender 3 (Apr. 21, 2006). On appeal, plaintiffs also sought to recuse the panel because they suspected that an African-American judge had recused herself, resulting in an "all-white, three-judge panel." *See* Natasha Korecki, *Court Hears Appeal of Reparations Suit: African-American Judge Recuses Self From Panel*, Chi. Sun-Times 16 (Sept. 28, 2006); Jeff Coen, *New Day in Court for Reparations: Plaintiffs Appeal Ruling in Suit Seeking Pay for Slaves' Descendants*, Chi. Trib. 1 (Sept. 28, 2006).

13 Natasha Korecki & Fran Spielman, "*Judge Says No To Reparations: Tosses Suit Against Firms Over Slavery, But "Fight Will Continue*," Chi. Sun-Times 8 (July 7, 2005) (quoting Conrad Worrill, Chairman of the National Black United Front).

14 Matt O'Connor, "*Judge Drops Suit Seeking Reparations: Slave Descendants Vow to Appeal*," Chi. Tribune 1 (Jan. 27, 2004) (quoting plaintiff Hannah Hurdle-Toomey).

15 Curtis Lawrence, *Judge Rejects Slavery Reparations Lawsuit: Says Lack of Link to Firms, Passage of Time Don't Back Case*, Chi. Sun-Times 6 (Jan. 27, 2004).

16 *In re African-American Slave Descendants Litig.*, 375 F. Supp. 2d at 780.

17 *Id.* at 731.

18 *Id.* at 735 (quoting Alfred L. Brophy, "*Some Conceptual and Legal Problems in Reparations for Slavery*," 58 N.Y.U. Ann. Surv. Am. L. 497, 499 (2003)).

19 *See, e.g.,* Cato v. United States, 70 F.3d 1103 (9th Cir. 1995) (slavery reparations claim against the federal government); Kelberine v. Societe Internationale, 363 F.2d 989 (D.C. Cir. 1966) (World War II reparations claims); *In re Nazi Era Cases Against German Defendants Litig.*, 129 F. Supp. 2d 370 (D.N.J. 2001) (same); Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424 (D.N.J. 1999) (same); Burger-Fischer v. Degussa AG, 65 F. Supp. 2d 248 (D.N.J. 1999) (same); *but see In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d 139 (E.D.N.Y. 2000) (approving class action settlement for Holocaust victims).

20 Flast v. Cohen, 392 U.S. 83, 95 (1968).

21 *Id.*

22 Raines v. Byrd, 521 U.S. 811, 819 (1997).

23 *In re African-American Slave Descendants Litig.*, 375 F. Supp. 2d at 744-45 (quoting Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 12 (2004)).

24 *Id.* at 745 (quoting *Elk Grove*, 542 U.S. at 12).

25 *Id.* at 748 (citing Allen v. Wright, 468 U.S. 737, 756 (1984)) (internal quotations omitted).

26 369 U.S. 186, 210 (1962).

27 *In re African-American Slave Descendants Litig.*, 375 F. Supp. 2d at 756 (citing United States v. Munoz-Flores, 495 U.S. 385, 394 (1990)).

28 *See Kelberine*, 363 F.2d at 995; *In re Nazi Era Cases Against German Defendants Litig.*, 129 F. Supp. 2d at 375 (D.N.J. 2001).

29 *In re African-American Slave Descendants Litig.*, 375 F. Supp. 2d at 758-59.

30 *Id.* at 767.

31 *Id.* at 770.

32 *Id.* at 775 (citing Johnson v. McAdoo, 45 App. D.C. 440 (1916)).

33 *Id.* at 776-77.

34 *In re African-American Slave Descendants Litig.*, -- F.3d --, 2006 WL 3615027, at *4 (7th Cir. Dec. 13, 2006).

35 *Id.*

36 *Id.* at *8

37 *In re African-American Slave Descendants Litig.*, 375 F. Supp. 2d at 726.

38 *Id.* at 727.

39 *Id.* at 728 (citing U.S. Const. Art. I, § 9, cl. 1 and The Fugitive Slave Act, ch. 60, § 6, 9 Stat. 462 (1850)).

40 *Id.* at 780.

41 *Id.* at 781.

42 Curtis Lawrence, "*Reparations Backer Sues Bush, Pope: Class-Action Lawsuit Demands Accounting of Profits From Slavery*," Chi. Sun-Times 7 (Jan. 8, 2004).