

REPRESENTING THE RACE: STANDING TO SUE IN REPARATIONS LAWSUITS

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I. INTRODUCTION

The fundamental problem raised by reparations, and particularly reparations litigation, is the question of how to apportion responsibility for historical wrongs. The most controversial harm targeted by reparations litigation is the enslavement of Africans and African Americans and the injuries consequent to that enslavement. The task faced by such litigation, therefore, is to construct persuasive theories explaining who is to bear responsibility for this and other race-based historical wrongs; to determine how such wrongs should be compensated; and to identify who is to receive that compensation.

So far, most litigants have advanced only broad descriptions of the communities injured and the harms suffered during slavery.¹ Moving beyond these sweeping generalizations, however, the task of charting our mutual responsibilities becomes more complex. It is not always easy to identify with specificity the wrong suffered or the benefit conferred, nor the link between that wrong or benefit and the responsibility for redressing it. Not every injury obliges the perpetrator to make the victim whole. Some wrongs are justified, and others excused, often—as in the case of slavery—by express governmental permission. A society’s willingness to tolerate, justify, or excuse wrongs such as slavery may change over time, often as a result of legislative action, but more often thanks to changing social mores. For example, where once the University of Alabama defended slavery, now it may be time for the faculty to apologize for sponsoring slavery and owning slaves.²

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1. See, e.g., *Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir. 1995) (“complaint seek[ing] compensation of \$100,000,000 for forced, ancestral indoctrination into a foreign society; kidnapping of ancestors from Africa; forced labor; breakup of families; removal of traditional values; deprivations of freedom; and imposition of oppression, intimidation, miseducation and lack of information about various aspects of their indigenous character”).
2. See, e.g., Jeff Amy, *Professor Wants UA Apology for Slavery*, MOBILE REGISTER, Mar. 16, 2004, at 1.

Even when a wrong is condemned, it may not be possible to correct it or provide compensation. Some wrongs may lack a particular perpetrator. For example, we may feel wronged by “fate” or “chance” when a hurricane destroys our property.³ Such feelings may be tied to the reasonable belief that some form of injustice has been wrought, even though no individual has inflicted the injury. Alternately, the wrong may have an identifiable human source who is no longer available to provide compensation—she may be dead, missing, or destitute—despite the continuing impact of the injury upon the victim.

The demand for compensation, however, does not become less reasonable or just due to the absence of a specific perpetrator. There are clearly some injuries that, although not caused by a particular individual, we as a society justifiably identify as deserving of some form of reparative compensation, even when the victims contribute to the wrong.⁴ On the other hand, there are some injuries that we refuse to remedy through government action, even though “society” in some general sense is responsible for the unhappy state of affairs.⁵

This Article primarily addresses a variety of issues raised by attempts to litigate reparations for African Americans and, as a subsidiary matter, with certain consequences of such litigation as a political or social matter. I propose to consider one legal solution to the issue of responsibility in reparations litigation: the relationship between plaintiff, defendant, and injury established by the concept of standing.

My goal is not so much to provide an exegesis of the doctrine of standing, as it is to use the concept to highlight some of the problems facing reparations lawsuits in the current legal and political climate. I suggest that the standing model generally requires some sort of continuing relationship, and thus—if reparations are to be traced to slavery—some enduring plaintiff, harm, and perpetrator. If, as seems required by slavery reparations lawsuits, the relation is to survive the absence of the original victim, there must be some harm that is transmitted from victim to victim across generations. Identifying such harms then becomes an essential part of reparations litigation, and may produce surprising results.

II. AN OVERVIEW OF THE STANDING DOCTRINE

Despite the number of articles mentioning standing to sue in reparations lawsuits, there has been very little in-depth analysis of the issue.

In federal court, the issue of standing is particularly important because of the constitutional and prudential bases upon which a lawsuit can be maintained.⁶ The federal standing doctrine requires the plaintiff to ar-

3. See, e.g., JUDITH N. SHKLAR, *THE FACES OF INJUSTICE* 51–56 (Yale Univ. Press 1992) (1990).

4. For example, the federal and state governments typically make some form of payment to the victims of catastrophic “acts of nature,” even though those victims have, to an extent, contributed to their loss by putting themselves in harm’s way, e.g., by moving to a place where hurricanes are likely to hit or by failing to obtain private insurance.

5. These may include preferences allotted on the basis of class or wealth.

6. See U.S. CONST. art. III, § 2, cl. 1. See also *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

ticulate an actual injury so as to demonstrate a relationship between the injury and both herself and the defendant (that she suffered the injury and that the defendant caused it), and to show that there is something the defendant can do to atone for causing the injury⁷—often, although not always, by making some monetary payment or performing or refraining from performing some act.

Standing is, therefore, a useful legal and moral tool because it premises suit upon a relationship between the parties to the suit. That relationship is established, in part, by the infliction of an injury by one upon the other. Under the standing doctrine, the relationship becomes legally important only if the defendant is in some way both directly responsible for causing the injury, and able to redress it. As a consequence, an essential prerequisite to bringing suit is the plaintiff's ability to establish with precision her relationship to the injury and the defendant.

The standing doctrine is particularly interesting given the different types of reparations lawsuits currently on file. These lawsuits can be separated into three distinct types, each of which manifests a different approach to standing. The first, "traditional" model of reparations seeks suit against a defendant or defendants on behalf of a plaintiff class comprised of descendants of slaves. The traditional model explicitly assumes that a familial relationship between the ancestor victim and the descendant plaintiff—what might be called hereditary or genetic standing—is sufficient to bring suit.

The second type of lawsuit seeks compensation on behalf of victims of Jim Crow discrimination. Ideally, such an action does not bring suit on behalf of a group of descendants (though descendants may be included in the suit), but on behalf of a group of still-living plaintiffs.⁸ Here, no genetic standing is assumed, and the injured party is the person bringing suit directly against the entity that inflicted the injury.

The third type of lawsuit may be brought under a state's "private attorney general" doctrine, by which a private citizen may bring a suit on behalf of a group where justice requires.⁹ There is no required relationship between the plaintiff and the injury alleged. When such suits are brought in state court, the federal standing rules do not apply,¹⁰ so long as the jurisdiction permits a type of standing broader than that enforced by the United States Constitution's Case and Controversy Clause.

My purpose in writing this Article is to suggest that, under the relational model of standing, the traditional approach, which seeks restitution

7. The constitutional requirements are that the plaintiff establish a concrete injury in fact, causation between the alleged injury and the alleged conduct of the defendant, and redressability. The prudential requirements are that the plaintiff assert her own particularized rights, and that the plaintiff's complaint must fall "within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." See *Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 474–75 (1982).

8. Where the proper plaintiff is dead, then a descendant may be a proper party. That will depend, however, on the type of injury alleged. See *infra* p.107.

9. For example, California permits suits on behalf of private attorneys general. See CAL. CIV. PROC. CODE § 1021.5 (West 2004).

10. Michael T. Williams, *Still Standing After All These Years: Who Can Bring a § 17200 Action?*, 694 PLI/LIT 23 (2003).

from persons, including corporations, on the basis of unjust enrichment, proves somewhat problematic in practice. The notion that standing can be inherited (the “genetic” theory of standing) is both legally and morally suspect; and the notion that groups, rather than individuals, have standing to sue, is legally insupportable.

Furthermore, the “traditional” reparations suit appears to present a gap in the relationship between plaintiff, defendant, and harm. Such suits seek some form of “public welfare” relief. The proposed remedy is some type of payout that will address the needs of those African Americans who are “bottom stuck,” in the words of one of the leading reparations advocates, Professor Charles Ogletree.¹¹ Thus, the redress sought is under-inclusive, in that it excludes a large portion of the individuals entitled to receive relief (rich former descendants of slaves). It is also over-inclusive to the extent that it includes within the public welfare programs those who are not descendants of African American slaves and who, therefore, have no right to receive compensation from the defendants.¹²

A further complicating factor is that the viability of claims to standing depends, in large part, upon the type of injury identified. For a start, the type of injury asserted establishes the existence and scope of the relationship between plaintiff and defendant. Furthermore, some injuries are more likely to be transferred across generations than others, as a matter of both morality and of law. Reparations advocates must explore, therefore, a variety of theories of recovery if they are to formulate a proper basis for bringing suit.

There are at least two advantages to casting outside the pool of civil rights or torts law to establish the injury necessary for standing. First, non-traditional reparations theories may avoid certain problems associated with statutes of limitations. Second, and more interestingly, seeking relief based on theories outside tort law and the Thirteenth and Fourteenth Amendments may expose the manner in which slavery—and American citizenship or subjecthood—involved and still involves a range of inter-relationships that exist outside the traditional civil rights paradigm.

On this view, reparations, as a philosophical matter, may hark back to that prototypical American project—engaged in by Henry David Thoreau and Ralph Waldo Emerson—of charting our mutual “investments” in the American polity. More legally and pragmatically, the reparations movement may mark the first time since *Brown v. Board of Education* in which the federal Constitution takes a back seat in achieving racial justice for Americans.

III. SOME PROBLEMS WITH HEREDITARY INJURIES

Reparations suits are often presented as some form of class action lawsuit brought on behalf of all African American descendants of slaves, and to that extent, present two particular difficulties under the standing doctrine. The first difficulty is a representational one: whichever party is chosen to represent the class of all African American descendants of slaves

11. Charles J. Ogletree, Jr., *Litigating the Legacy of Slavery*, N.Y. TIMES, Mar. 31, 2002, § 4, at 9.

12. See, e.g., *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983).

must herself establish standing to sue on behalf of the rest of the class.¹³ The second difficulty depends upon the alleged injury: the plaintiff must also show that her relationship to the alleged injury is one that the law is bound to recognize.

Generally, when asserting the right to sue on behalf of African American slaves, it has been assumed that a descendant of slaves will have standing to sue. This seems premised upon some form of “genetic”—or, derivatively, some form of psychological—relation between the descendant and the original victim, as if standing could be premised upon some form of hereditary condition. For standing purposes, however, the hereditary or genetic relationship is important only insofar as it establishes a relationship between the descendant and the injury. It is far from clear that the relevant types of injury are transmitted between generations by virtue of a biological relationship and nothing more.¹⁴

Imagine that two groups of African Americans arrived in America in 1798 on a slave ship, to be sold at auction in the District of Columbia.¹⁵ As they arrived, the federal government medically altered each slave in both groups by placing a unique genetic imprint, transmissible from generation to generation, in each slave’s DNA. Two different modification techniques were used such that, for the first group, the imprint had physically harmful side effects, negatively impacted the individual’s health, and shortened his or her life expectancy; whereas for individuals in the second group, no harmful side effects were present. The slaves were then sold, mistreated, and discriminated against on the basis of their race in a manner that was legally permissible given the state of the law at the time.

In effect, the modification operates as a tagging device, enabling us to determine who are the descendants of these two groups of slaves.¹⁶ The descendants of the first group of slaves have standing to sue the government for their current disabilities traceable to the genetic modification. There is an actual injury suffered by each defendant that was caused by the federal government and can be compensated, at least in part, by some form of payment or treatment. The second group of plaintiffs cannot assert this type of injury. Instead, they have to seek compensation either for the mis-

13. When plaintiffs seek relief against a state agency, relief on behalf of a large class of plaintiffs is inappropriate, relief is limited to the plaintiffs named in the suit. See *Rizzo v. Goode*, 423 U.S. 362, 367–69 (1976) (holding where only two of twenty-eight alleged incidents, involving only two police officers, and involving deprivation of a federal right, broad-based relief is not warranted). See also *Lyons*, 461 U.S. at 97–100 (holding a single plaintiff’s allegation that his constitutional rights were violated insufficient to justify city-wide injunctive relief).

14. See *In re African American Slave Descendants Litig.*, 304 F. Supp. 2d 1027, 1047 (N.D. Ill. 2004) (“Plaintiffs cannot establish a personal injury by merely identifying tort victims and alleging a genealogical relationship.”).

15. This date is chosen so as to fall after the promulgation of the United States Constitution and before the end of the legal trade in slaves.

16. In fact, just this sort of “tagging” argument appears to be advanced by Deadria Farmer-Paellmann in a recent lawsuit against Lloyds of London. See Conal Walsh, *Slave Descendants Sue Lloyd’s for Billions: Americans Whose Ancestors Were Taken from Africa in Chains Have Hired a Feared New York Lawyer to Seek Compensation for the Insurer’s Support of “Genocide,”* OBSERVER, Mar. 24, 2004, at 3. Unless Farmer-Paellmann’s complaint can demonstrate a current injury, DNA alone is insufficient to remedy the problems raised by standing.

treatment of their ancestors in 1778 and throughout the period of slavery, or claim that they suffer an ongoing harm much like the first group of slaves. It is much harder, however, to identify with the same precision what is the slavery-based harm suffered by the second group unless there is some way in which to link a present injury directly to the harm experienced by their ancestors.¹⁷

Therefore, it would seem necessary, as a reparations plaintiff, to find some form of specific, present injury attributable to a defendant's past acts. This relationship becomes harder to establish when the defendant is deceased or disappeared. In the example of the genetically tagged slaves, the federal government is, for legal purposes, the same entity now as it was in 1798. A variety of other public and private institutions also possess the ability to exist, so far as the law is concerned, perpetually. Individuals do not possess this characteristic: the relationship of a human defendant to the asserted injury would thus face the same problems of heredity as those faced by the plaintiff. In the three types of lawsuit currently on file, individuals are sued, if at all, in their official capacities, and so the problem of the relationship between defendant and injury is not presented.¹⁸

One attempt to specify this type of harm was contained in *Farmer-Paellmann v. FleetBoston Financial Corp. et al.*, filed in the Eastern District of New York, on March 26, 2002.¹⁹ In that lawsuit, the plaintiff attempted to establish both the injury suffered and the standing to sue. According to the plaintiff, the relevant injuries were "the vestiges [of slavery], racial inequalities and cultural psychic scars [that] left a disproportionate number of American slave descendants injured and heretofore without remedy."²⁰

The defendants were FleetBoston Financial Corp., AETNA Inc., and CSX, Corp. FleetBoston was alleged to be a successor in interest to a bank founded by an individual who also owned ships that were used to trade slaves.²¹ AETNA is an insurance corporation, the predecessors of which provided insurance policies on slaves, including slaves that worked in agriculture.²² CSX is a railroad corporation, the predecessors of which used slaves to construct railroads. The defendants caused plaintiffs' injuries by: "Conspir[ing] with slave traders, with each other and other entities and institutions . . . to commit and/or knowingly facilitate crimes against humanity, and to further illicitly profit from slave labor."²³ The plaintiff class consisted of "slave descendants whose ancestors were forced into slavery from which the defendants unjustly profited," and the named

17. Put differently, the present-day plaintiffs must demonstrate a present-day injury, although that injury is attributable to the manner in which their ancestors were treated.

18. Nevertheless, there may be some issues in Farmer-Paellmann's lawsuit surrounding the liability of the corporate defendants as successors in interest of the original entities alleged to have caused the injury.

19. Complaint and Jury Trial Demand, *Farmer-Paellmann v. FleetBoston Fin. Corp.*, No. 02-CV-1862 (E.D.N.Y. filed Mar. 26, 2002) [hereinafter Paellmann Complaint].

20. *In re African American Slave Descendants Litig.*, 304 F. Supp. 2d 1027, 1041 (N.D. Ill. 2004); Paellmann Complaint, *supra* note 19, ¶ 12, at 4.

21. Paellmann Complaint, *supra* note 19, ¶ 29, at 8.

22. Paellmann Complaint, *supra* note 19, ¶ 30, at 9.

23. *In re African American Slave Descendants Litig.*, 304 F. Supp. 2d at 1042; Paellmann Complaint, *supra* note 19, ¶ 20, at 6-7.

plaintiff was “a New York resident whose ancestors were enslaved in the agricultural industry.”²⁴

In dismissing the complaint, the district court held that there was little to connect Farmer-Paellmann, as the named plaintiff, to the defendants. There was no allegation that she is descended from the slaves shipped by Brown to America (or that FleetBoston’s predecessors were engaged in such a trade), or insured by AETNA (or that insuring slaves injured them), or that her ancestors worked for a railroad corporation.²⁵

One of the problems with the *Paellmann Complaint* may be that her standing claims are just not specific enough. After all, she could simply amend the complaint to allege that her ancestors were shipped by Brown to America; that they were insured under a policy with AETNA; and that they engaged in railroad work for CSX.²⁶ But does this set of issues permit her to state an injury traceable to and redressable by the defendants? Even if her claimed injury is sufficiently specific, it is not clear that she herself is harmed. The fact of having an enslaved ancestor, even one transported, insured, or put to work by the defendants, does not seem sufficient injury without something more. As the “genetic tagging” example illustrates, “descent from slaves” is not of itself an injury; rather, the sorts of legally relevant injuries are harms suffered by individuals that are attributable to the ongoing effects of slavery.²⁷

Such harms are relatively easy to identify. They include all the continuing and pernicious social indignities that structure race relations in America. These are in part traceable to the institution of slavery and the racial stigmas and stereotypes it created, enforced, and yet perpetuates. Many of these stigmas and stereotypes have an oppressive impact upon African Americans today. Accordingly, as far as the relational structure of standing is concerned, the institution of slavery may be important only insofar as it exists as a continuing cause of present-day harms, and irrelevant until particularized into concrete relations between individuals or groups.

An immediate and obvious objection to the foregoing suggestion is that slavery itself, and the types of torture and murder perpetrated by

24. Paellmann Complaint, *supra* note 19, ¶¶ 21, 26, at 7; see *In re African American Slave Descendants Litig.*, 304 F. Supp. 2d at 1075 n.5.

25. See *In re African American Slave Descendants Litig.*, 304 F. Supp. 2d at 1048. Farmer-Paellmann’s current lawsuit against Lloyds of London stands some chance of success only if she can place one of her ancestors on board one of the ships actually insured by Lloyds. Failure to do so will undermine her claim to have standing. See Walsh, *supra* note 16, at 3.

26. Here her problem may become one arising under FED. R. CIV. P. 11 if there is no basis upon which to amend the complaint to allege these facts.

27. This is precisely the critique of reparations mounted by some conservatives. See, e.g., Armstrong Williams, *Reparations Reverie*, WASH. TIMES, Jan. 5, 2001, at A15 (“The civil rights leaders are nurturing a movement that would encourage full-grown, capable adults to blame the missed opportunities of their lives on the slavery that transpired in the distant past—as though their pains were interchangeable with those endured by slaves By failing to draw a distinction between past and present, the reparations issue encourages the view that all blacks are victims, and that all whites are collectively responsible.”). Again, it may be that without some present injury, the relationship that Farmer-Paellmann seeks to establish through DNA evidence in her current lawsuit may be insufficient. See Walsh, *supra* note 16, at 3.

slave-owners on slaves, constitutes the sort of injury sufficient to demonstrate standing. Certainly, slavery is now recognized as a form of human rights abuse and is currently the subject of litigation in American courts using the Alien Tort Claims Act (ATCA). The ATCA applies directly to corporations that have engaged in the slave trade or slavery. As interpreted in several recent cases, it permits aliens²⁸ to bring private tort suits against corporations²⁹ for certain human rights violations committed in the United States or abroad,³⁰ where those violations infringe upon either the “law of nations” or “a treaty of the United States.”³¹

The *Paellmann Complaint* does state claims for conspiracy and human rights violations³² that might be interpreted as similar to those contemplated under the ACTA. United States courts already acknowledge that the selling of human beings into slavery violates fundamental precepts of natural law. “[C]ourts have repeatedly held that ‘deportation to slave labor’ violates the law of nations.”³³ Where plaintiffs can allege that they

28. For non-U.S. citizens, the Alien Tort Claims Act “confers federal subject matter jurisdiction when: ‘(1) an alien sues (2) for a tort (3) committed in violation of the law of nations (i.e., international law).’ The ATCA grants district courts subject matter jurisdiction to entertain ‘suits alleging torts committed anywhere in the world against aliens in violation of the law of nations.’” *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 439 (D.N.J. 1999) (citation omitted).

29. “No logical reason exists for allowing private individuals and corporations to escape liability for universally condemned violations of international law merely because they were not acting under color of law [P]rivate entities using slave labor are liable under the law of nations.” *Id.* at 445.

30. The first two ATCA cases brought against a corporation were filed in 1996 against Unocal for alleged human rights violations committed in connection with the construction of an oil pipeline in Myanmar. Essentially, Unocal, in cooperation with the government of Myanmar, engaged in slave labor. The plaintiffs, Burmese villagers, claimed that Unocal was liable for acts of torture, rape, forced labor, and forced relocation committed by the Burmese military in furtherance of the pipeline project.

31. Although several ATCA cases have involved alleged violations of U.S. treaties, most ATCA plaintiffs have sued for breach of the law of nations. In the ATCA cases decided to date, courts have held that gross violations of human rights such as summary execution; disappearance; torture; cruel, inhuman, or degrading treatment; prolonged arbitrary detention; genocide; war crimes; and forced labor, violate the law of nations. Courts, however, have declined to recognize cultural genocide as covered by the act.

32. The complaint also states claims for conversion, unjust enrichment, and a demand for accounting. *Paellmann Complaint*, *supra* note 19, ¶¶ 52–57, 62–70, at 15–16, 17–18. These claims are best understood as conforming to a tort-based model of reparations, which raises somewhat similar legal, moral, and political issues. *See infra* pp. 104–05; *see also* Eric J. Miller, *Reconceiving Reparations: Multiple Strategies in the Reparations Debate*, 24 B.C. THIRD WORLD L.J. 25 (2004).

33. *Iwanowa*, 67 F. Supp. 2d at 440–41. *See also* *Handel v. Artukovic*, 601 F. Supp. 1421, 1426 n.2 (D.C. Cal. 1985); *Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995) (holding that conduct related to slave trade violates the law of nations); *Princz v. Federal Republic of Germany*, 26 F.3d 1160, 1180 (D.C. Cir. 1994) (acknowledging that forced labor of civilians during World War II violated international law); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 715 (9th Cir. 1992) (finding that “[t]he universal and fundamental rights of human beings identified by Nuremberg—rights against genocide, enslavement, and other inhumane acts . . . are the direct ancestors of the universal and fundamental norms recognized as *jus cogens*”); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J., concurring) (reiterating that genocide and slavery are “heinous actions—each of which violates definable, universal and obligatory norms”).

were “literally purchased . . . [s]uch assertions suffice to support an allegation that Defendants participated in slave trading.”³⁴

A reparations lawsuit, however, is not simply a suit seeking compensation for current enslavement, which would be covered by the Thirteenth Amendment as much as by the ACTA. Reparations suits (at least in their traditional form) are distinctive because the injured parties are long dead, and these parties are now represented by someone claiming a genetic or cultural relation to them. That is why such suits represent slavery as the cause of current social harms.

Suits under the ACTA, however, do not assert the type of general cultural or economic disenfranchisement resulting from slavery that is alleged in the *Paellmann Complaint*. The various ACTA lawsuits chart a particular relation between the individual victims of slavery, torture, or murder, and the defendants. Where a deceased’s survivor brings suit, plaintiffs not only demonstrate a close familial relation to the victim, but also some pecuniary loss.³⁵ Again, the fact of injury to a deceased—and in the case of slavery, long-deceased—family member may not be sufficient to state a claim even for violation of human rights. Some current or ongoing injury to the plaintiff is required.³⁶

This legal account of the importance of slavery may seem to miss what is politically or morally important: that the institution itself was a distinct and peculiar act of oppression by one group upon another by virtue of race alone. Slavery occupies a central place in reparations arguments for good reason. As Professor Derrick Bell argued when discussing Boris Bittker’s book on reparations, “there is a tactical loss in excluding the slavery period [from discussions of reparations]. Setting this voluntary limitation on coverage sacrifices much of the emotional component that provides the moral leverage for black reparations demands.”³⁷

My suggestion is that one consequence of standing’s relational model is that slavery is legally important because of the continuing disparity it perpetuates in modern society rather than as an expression of the capacity of one race to subjugate another, or even the fact that the white race did in fact subjugate African Americans in a despicable and vicious manner. Thus, some of the amorphous injuries more particularly identified in the *Paellmann Complaint*, particularly conspiracy and human rights violations with-

34. *Iwanowa*, 67 F. Supp. 2d. at 440 (citing *Doe v. Unocal Corp.*, 963 F. Supp. 880, 892 (C.D. Cal. 1997); *National Coalition Gov’t of the Union of Burma v. Unocal, Inc.*, 176 F.R.D. 329, 349 (C.D. Cal. 1997) (“allegations that defendants knowingly accepted the benefit of and approved the use of forced labor may be sufficient to state a claim for participation in slave trading”).

35. “The court’s definition of the class, however, refers only to those Philippines [sic] citizens who were (or whose descendants were) tortured, summarily executed or ‘disappeared’ while in military custody during a 14-year period. This is not a class, as the Estate contends, the size of which is almost unlimited.” *Hilao v. Estate of Marcos*, 103 F.3d 767, 774 (9th Cir. 1996).

36. Some loss of wages or property may be enough to demonstrate an ongoing harm, and so some traditional reparations lawsuits have presented the injury suffered in terms of wages lost or taxes gained thanks to slavery. See *Obadele v. United States*, 52 Fed. Cl. 432 (Ct. Fed. Cl. 2002).

37. Derrick A. Bell, Jr., *Dissection of a Dream*, 9 HARV. C.R.-C.L. L. REV. 156, 158 (1974) (reviewing BORIS I. BITTKER, *THE CASE FOR BLACK REPARATIONS* (1973)).

out current-day negative effects, fail to state an injury sufficient to confer standing on the plaintiff in that lawsuit.³⁸

A. *First Candidate for Hereditary Injury: Enduring Social Harm*

There are three candidates for the sort of enduring injury necessary to establish standing to sue for reparations: slavery as determinative of relative social position;³⁹ as causing an enduring psychological harm; or as resulting in some form of unjust enrichment. I shall consider each in turn.

The enduring social harm category has been used to explain much civil rights litigation, often in terms that appear reminiscent of the language of reparations, although it appears that this category is currently disfavored by the law.

Two competing visions of the harm inflicted by slavery and segregation, and consequently of the appropriate form of remedial action, have dominated the discussion of race for much of the past century. One is the principle of color-blindness, originally given legal significance by Justice Harlan's dissent in *Plessy v. Ferguson*,⁴⁰ suggesting essentially that race should play no part in apportioning public and some private benefits. The other is the principle of benign race-conscious remedial action, most forcefully articulated by the concurring opinions of Justices Brennan, Marshall, White, and Blackmun in *Bakke v. Regents of the University of California*,⁴¹ suggesting that where one race has been historically discriminated against on the basis of their race alone, then race-based, group-oriented remedial measures are justified so long as they do not unnecessarily stigmatize or impact members of the majority population.⁴²

Traditionally, the Equal Protection Clause was envisaged as a means to provide substantive equality to a group that had been denied the full benefits of citizenship. The notion of substantive equality promoted relief through race-conscious remedial programs. As expounded by Justices Brennan, Marshall, and Blackmun,⁴³ the concept of substantive equality was

38. Paellmann Complaint, *supra* note 19, ¶¶ 50–51, 57–61, at 14–16. *See also In re African American Slave Descendants Litig.*, 304 F. Supp. 2d at 1050 (“Plaintiffs’ allegations of abstract stigmatic injury are not cognizable absent specific allegations of conduct on behalf of the Defendants that has been directed at Plaintiffs or their ancestors.”).

39. I do not claim that this is true, although many descendants of slaves have achieved high social standing. Nonetheless, many more remain “bottom stuck.”

40. 163 U.S. 537, 560 (1896) (Harlan, J., dissenting).

41. 438 U.S. 265, 344 (1978).

42. *See, e.g., Bakke v. Regents of Univ. of Cal.*, 438 U.S. 265, 361 (1978) (Blackmun, J., concurring).

43. Describing the purpose of Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. §§ 1981a, 2000e through 2000e-17, Justice Blackmun pointed out that:

It is inconceivable that Congress intended to encourage voluntary efforts to eliminate the evil of racial discrimination while at the same time forbidding the voluntary use of race-conscious remedies to cure acknowledged or obvious statutory violations The legislative history of this race-conscious legislation reveals that it represents a deliberate attempt to deal with the excessive rate of unemployment among minority citizens and to encourage the development of viable minority controlled enterprises Properly construed, therefore, our prior cases unequivocally show that a state government may adopt race-conscious programs if the purpose of such programs is to remove the disparate racial im-

explicitly designed to link a history of discrimination with present injuries. In *Bakke*, Justice Brennan, who authored an opinion in which four other justices joined, endorsed an expansive view of the social harm that would justify the state [in] creating race-conscious programs whose “articulated purpose [was] remedying the effects of past societal discrimination.”⁴⁴ Brennan “approved of ‘race-conscious programs’ for the purpose of remedying the ‘disparate racial impact’ that an admissions policy might otherwise have ‘if there is reason to believe that the disparate impact is itself the product of past discrimination, whether its own or that of society at large.’”⁴⁵

Justice Brennan’s argument was amplified by Justice Marshall, who argued that:

The relationship between [various employment and health statistics demonstrating the disadvantaged status of blacks relative to whites] and the history of unequal treatment afforded to the Negro cannot be denied. At every point from birth to death the impact of the past is reflected in the still disfavored position of the Negro.⁴⁶

Marshall recognized that, for most African Americans, their limited access to the social benefits routinely enjoyed by whites was, in part, a result of the government-endorsed system of racial discrimination that had been upheld and promoted at every level of society between *Plessy* and *Brown*:

[F]or several hundred years Negroes have been discriminated against, not as individuals, but rather solely because of the color of their skins. It is unnecessary in 20th-century America to have individual Negroes demonstrate that they have been victims of racial discrimination; the racism of our society has been so pervasive that none, regardless of wealth or position, has managed to escape its impact. The experience of Negroes in America has been different in kind, not just in degree, from that of other ethnic groups. It is not merely the history of slavery alone but also that a whole people were marked as inferior by the law. And that mark has endured. The dream of America as the great melting pot has not been realized for the Negro; because of his skin color he never even made it into the pot.⁴⁷

impact its actions might otherwise have and if there is reason to believe that the disparate impact is itself the product of past discrimination, whether its own or that of society at large.

Bakke, 438 U.S. at 336, 348–49, 369 (Blackmun, J., concurring).

44. *Bakke*, 438 U.S. at 362 (Brennan, J., concurring).

45. *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188, 1198 (9th Cir. 2000) (quoting *Bakke*, 438 U.S. at 369 (Brennan, J., concurring)).

46. *Bakke*, 438 U.S. at 396 (Marshall, J., concurring).

47. *Id.* at 400–01 (Marshall, J., concurring). In a memorandum to the Court, Marshall made a similar argument:

The dream of America as a melting pot has not been realized by Negroes—either the Negro did not get into the pot, or he did not get melted down. . . . [T]he vast gulf between White and Black America . . . was brought about by centuries of

For Marshall, this nation's history of race-based discrimination was intrinsic to our national institutions and structured the social experience of African Americans in a fundamental manner.

In contrast with the historicism of the race-conscious approach, color-blindness as a principle of anti-discrimination is essentially ahistorical and conservative. At best, it precludes state or, in certain circumstances, private actors from using minority status as a reason for refusing to grant a benefit. At worst, it enforces the status quo by precluding remedial action directed towards the discriminated-against minority, on the basis that to do so is to make a color-conscious decision—a decision that in turn discriminates against members of the majority group on the basis of *their* race.

The argument in favor of benign race-based remediation depends, then, upon an attention to history that traces current inequality of status or social opportunity to a history of discrimination. The rejoinder to such an approach, as exemplified in the principle of color-blindness, is to focus on relations between individuals rather than groups and so render irrelevant the impact of history. The failure of the remedial historical approach to achieve constitutional primacy was made manifest in a series of decisions in the 1990s, in particular *Adarand Constructors, Inc. v. Peña*,⁴⁸ and *Richmond v. J. A. Croson Co.*⁴⁹ (as well as in a variety of voting rights cases).⁵⁰ In these cases, the Court refused to look to general societal discrimination—or even a history of institutional discrimination—as sufficient reason for establishing a remedial program that seeks to grant access to benefits to minorities on the basis of race alone.

In *Croson*, the Court considered the constitutionality of the City of Richmond's minority set-aside program. Under the terms of the program, thirty percent of public construction contracts were reserved for minority contractors. The Court held that such a program violated the Equal Protection Clause of the Fourteenth Amendment. In so doing, the Court refused to take a state's assertion of a particular racial classification as "benign" at face value. Instead the Court held any racial classification "suspect" and subject to strict scrutiny, whether remedial or not.⁵¹ In fact, the Court looked to the relation between the claimed injury and the relief re-

slavery and then by another century in which, with the approval of this Court, states were permitted to treat Negroes "specially." . . . We are not yet all equals, in large part because of the refusal of the Plessy Court to adopt the principle of color-blindness. It would be the cruelest irony for this Court to adopt the dissent in Plessy now and hold that the University must use color-blind admissions.

Memorandum of Justice Marshall, Apr. 13, 1978, at 1 (unpublished memorandum from Thurgood Marshall Papers, Library of Congress, Box 204, Folder 3) (quoted in Michael Selmi, *The Life of Bakke: An Affirmative Action Retrospective*, 87 GEO. L.J. 981, 994 (1999).

48. 515 U.S. 200 (1995).

49. 488 U.S. 469 (1989).

50. See, e.g., *Shaw v. Reno*, 509 U.S. 630 (1993); *United States v. Hays*, 515 U.S. 737 (1995); *Miller v. Johnson*, 515 U.S. 900 (1995); *Bush v. Vera*, 517 U.S. 952 (1996) (plurality opinion).

51. The Court stated that "the mere recitation of a 'benign' or legitimate purpose for a racial classification is entitled to little or no weight. Racial classifications are suspect, and that means that simple legislative assurances of good intention cannot suffice." *Croson*, 488 U.S. at 500 (citation omitted).

quested,⁵² two of the components of the standing analysis, to reject the claim that the City of Richmond had stated an injury that was sufficiently narrowly tailored to withstand strict scrutiny.⁵³

The Court later extended this Equal Protection Clause analysis to federal contracts. In *Adarand Constructors*, the Court expressly rejected the concept of benign remedial racial classifications, holding that the Constitution prohibits *any* discrimination based upon membership in a racial group. The Court held that:

[the] Fourteenth Amendment[] protect[s] persons, not groups . . . [and] that all governmental action based on race—a group classification long recognized as in most circumstances irrelevant and therefore prohibited—should be subjected to detailed judicial inquiry to ensure that the *personal right to equal protection has not been infringed*.⁵⁴

The effect of *Croson* and *Adarand Constructors* is to render the historical analysis necessary to relate past discrimination to present social disadvantage almost irrelevant.⁵⁵ By redefining the scope of the injury, the Court has changed the legally relevant relation from one between individuals as members of a group—one of which benefits from a history of racial discrimination and one of which suffers because of that relation—to that between individuals, one of whom will suffer from race-based remedial efforts and one of whom will benefit. As Professor Cheryl Harris puts it:

[T]he Court's chronic refusal to dismantle the institutional protection of benefits for whites that have been based on white supremacy and maintained at the expense of blacks [has had the result that] the parameters of appropriate remedies are not dictated by the scope of the injury to the subjugated, but by the extent of the infringement on settled expectations of whites.⁵⁶

52. According to the Court:

a generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy. It "has no logical stopping point." "Relief" for such an ill-defined wrong could extend until the percentage of public contracts awarded to [minority contractors] in Richmond mirrored the percentage of minorities in the population as a whole It is sheer speculation how many minority firms there would be in Richmond absent past societal discrimination Defining these sorts of injuries as "identified discrimination" would give local governments license to create a patchwork of racial preferences based on statistical generalizations about any particular field of endeavor.

Id. at 498–99.

53. *Id.* at 499–500.

54. *Adarand Constructors*, 515 U.S. at 202 (citation omitted) (emphasis added).

55. A public entity is entitled to engage in benign remedial efforts based upon race only so long as it has historically engaged in the type of discrimination it seeks to remedy; its remedial efforts are narrowly tailored; and evidence of discrimination is sufficient to justify the use of a racial classification. *Croson*, 488 U.S. at 498–507. A different standard applies in the educational sphere. See *Grutter v. Bollinger*, 539 U.S. 306 (2003).

56. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1767–68 (1993).

The limitation of color-blindness as a remedial principle is particularly apparent in the affirmative-action style cases, from *Bakke*,⁵⁷ right up to *Gratz v. Bollinger*⁵⁸ and *Grutter v. Bollinger*,⁵⁹ but also including *Adarand Constructors* and *Croson*. In each case, a relatively small incremental attempt to engage in a process of race-based and remedial social transformation has faced the significant obstacle that the action taken to ensure minority participation in a limited set of benefits (public contracts, university places) necessarily curtails majority participation in those benefits. It does not matter that the history of slavery and segregation has artificially boosted majority participation in the benefit at issue. On the color-blind model, once the racially constituted status quo is established, it cannot be changed using further racial criteria. Understanding the current state of the law, the issue then becomes, given the failure of race-based remediation as a litigation strategy, what hope does reparations have given the current constitutional climate?⁶⁰

B. Second Candidate for Hereditary Injury: Psychological Harm

Another source of injury, expressed in the *Paellmann Complaint*, is that of some ongoing psychological wound experienced by descendants of slaves.⁶¹ The *Paellmann Complaint* acknowledges that there are “racial inequalities and cultural psychic scars” suffered by present-day African Americans which are attributable to slavery.⁶² Certainly, where individual plaintiffs can demonstrate some form of individualized harm attributable to slavery, then the relational aspect of standing will be satisfied. I do not believe that such a showing is impossible, though no such showing has been attempted in any of the slavery reparations lawsuits dismissed by the District Court for the Northern District of Illinois.⁶³

57. 438 U.S. 265, 361 (1978).

58. 539 U.S. 244 (2003).

59. 539 U.S. 306 (2003).

60. In the controlling slavery reparations case, *Cato v. United States*, 70 F.3d 1103 (9th Cir. 1995), the Ninth Circuit dismissed suit on the basis of sovereign immunity. The court did, however, indicate that the “continuing violations” doctrine—whereby a suit is permissible so long as the violation from which it results continues through the time limit of the applicable statute of limitations—may apply to permit such a suit. *Id.* at 1107. In *Cato*, an African American woman brought an action for damages against the United States government, alleging the kidnapping, enslavement, and transshipment of her ancestors, as well as continuing discrimination on the part of the government. *Id.* at 1106. She sought damages for “forced, ancestral indoctrination into a foreign society; kidnapping of ancestors from Africa; breakup of families; removal of traditional values, deprivations of freedom; and imposition of oppression, intimidation, miseducation, and lack of information about various aspects of their indigenous character.” *Id.* She also sought a court acknowledgment of the injustice of slavery and Jim Crow oppression, as well as an official apology from the United States government. *Id.*

61. See *In re African American Slave Descendants Litig.*, 304 F. Supp. 2d at 1042.

62. *Id.*

63. Of the nine actions dismissed by the Northern District, eight were transferred to the court on October 25, 2002, by the Judicial Panel on Multidistrict Litigation for coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407. They included: *Porter v. Lloyds of London*, No. 02-CV-6180 (N.D. Ill. filed Aug. 29, 2002) (class action lawsuit on behalf of all African American descendants of slaves against

Of more interest, perhaps, is the “psychological harm” argument, which has a certain currency,⁶⁴ in part, I suspect, because it can be used to identify all African Americans as sharing an ongoing injury simply by virtue of being a descendant of slaves. To that extent, the psychological harm argument is an “essentialist” one, pointing to a feature that inheres in the psyche of all descendants of slaves. It is often presented as comparable to the type of “genetic tagging” in the example discussed earlier, in that it identifies a feature produced uniquely through slavery but continuing to inflict a present injury upon contemporary African American descendants of slaves. For example, one proponent of reparations has argued that the “cultural genocide and associated psychological traumas [caused by the enslavement of African Americans] created spirit-injuries so deep that current generations of Blacks still carry scars.”⁶⁵

Perhaps the most famous accounts of the psychological harm suffered by African Americans are those presented by W. E. B. Du Bois in *The Souls of Black Folk*,⁶⁶ and Chief Justice Warren in the famous footnote eleven of *Brown v. Board of Education*.⁶⁷

In *The Souls of Black Folk*, W. E. B. Du Bois introduces his discussion of the “double consciousness” inflicted upon African Americans by American society.⁶⁸ Du Bois considers that: “the Negro is a sort of seventh son, born with a veil, and gifted with second-sight in this American world—a world which yields him no true self-consciousness, but only lets him see

various corporations presenting claims for conspiracy, human rights violations, conversion, unjust enrichment, and a demand for accounting); Carrington v. FleetBoston Fin. Corp., No. 02-CV-1863 (E.D.N.Y. filed Mar. 26, 2002); Farmer-Paellmann v. FleetBoston Fin. Corp., No. 02-CV-1862 (E.D.N.Y. filed Mar. 26, 2002) (class action lawsuit on behalf of all African American descendants of slaves against various corporations presenting claims for conspiracy, human rights violations, conversion, unjust enrichment, and a demand for accounting); Barber v. N.Y. Life Ins. Co., No. 02-CV-2084 (D.N.J. filed May 2, 2002) (class action lawsuit on behalf of all African American descendants of slaves against various corporations presenting claims for conspiracy, human rights violations, conversion, and unjust enrichment, and a demand for accounting); Johnson v. Aetna Life Ins. Co., No. 02-CV-9180 (E.D. La. filed Sept. 3, 2003) (class action lawsuit on behalf of all African American descendants of slaves against various corporations presenting claims for conspiracy, human rights violations, conversion, and unjust enrichment, and a demand for accounting); Hurdle v. FleetBoston Fin. Corp., No. 02-CV-4653 (N.D. Cal. filed Jan. 17, 2003) (class action lawsuit on behalf of all African American descendants of slaves against various corporations presenting claims for violations of CAL BUS. & PROF. CODE § 17200 and a demand for accounting); Hurdle v. FleetBoston Fin. Corp., No. CGC-02-0412388 (Cal. Super. Ct. filed Sept. 10, 2002) (same).

64. See, e.g., Rhonda V. Magee, Note, *The Master's Tools, from the Bottom Up: Responses to African-American Reparations Theory in Mainstream and Outsider Remedies Discourse*, 79 VA. L. REV. 863, 894 (1993); Kevin Hopkins, *Forgive U.S. Our Debts? Righting the Wrongs of Slavery*, 89 GEO. L.J. 2531, 2534 (2001) (suggesting “it will take centuries to fully repair the emotional scars imposed by [slavery]”).

65. Christian Sundquist, *Critical Praxis, Spirit Healing, and Community Activism: Preserving a Subversive Dialogue on Reparations*, 58 N.Y.U. ANN. SURV. AM. L. 659, 668 (2003).

66. W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK* 1–9 (Bantam Classic ed., Bantam Books 1989) (1903).

67. 347 U.S. 483, 494 n.11 (1954).

68. See DU BOIS, *supra* note 66, at 1–9.

himself through the revelation of the other world."⁶⁹ According to Du Bois, then, African Americans lack a fully integrated sense of self, and are instead condemned to see themselves in part through the distorting lens of a community that uses derogatory stereotypes to discriminate against them. This is an enduring and palpable psychological handicap.⁷⁰

In *Brown*, Chief Justice Warren used sociological data to demonstrate the second-class citizenship of African Americans as enforced through the psychological disadvantages inflicted upon African American schoolchildren by segregation.⁷¹ The Court found that "[s]egregation with the sanction of law . . . has a tendency to [retard] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system."⁷² The Court then cited a variety of psychological evidence to bolster the conclusion that segregation inflicts psychological damage on school children.⁷³

Both these statements of psychological harm, however, do not refer to slavery but to present discrimination. In each case, it is the current social condition faced by African Americans—a condition that stigmatizes them as second-class citizens—that does the damage. Slavery may be part of the historical conditions that create the stigma, and so important in understanding from whence the stigma comes and why it assumes the forms it does. Nonetheless, slavery is not the proximate cause of the current psychological injuries experienced by African Americans; current discrimination is.⁷⁴

Another way to consider this claim is to look at institutions expressly designed to inflict psychological harm on African Americans. For example, the practice of segregation was enforced not only by express legislation in the various states, but also by a set of customary norms. Violation of these norms resulted in extreme repressive measures that, although undertaken by private parties, were often sanctioned by the state.⁷⁵ These

69. DU BOIS, *supra* note 66, at 3. See also Eric J. Miller, *Book Review: Signifyin' Nothing?: Conversations on Race, Color, and Community*, 13 HARV. BLACKLETTER L.J. 241, 250 (1997) (discussing some of the consequences of his theory—e.g., consciousness of person "depends in part on understanding how white people perceive African Americans," resulting in a self-image that is fractured and mediated).

70. Du Bois, I would suggest, means it as more than psychology: it is a metaphysical harm that precludes full integration of the African American self-identity.

71. *Brown*, 347 U.S. at 494 n.11.

72. *Id.* at 494.

73. *Id.* at 494 n.11.

74. Some support for this idea may be found in the debate surrounding the creation of a slavery museum to commemorate African Americans' surviving slavery. Many African Americans resisted a museum's establishment on the grounds that the history of slavery imposes a stigma upon African Americans and should not be commemorated. Based upon the above argument, the stigmatic harm of slavery is not to be discounted, but rather is minimal compared with the larger, present-day examples of discrimination.

75. For example, the Oklahoma Commission to Study the Race Riot of 1921 and the State of Oklahoma itself have documented the State's complicity in a variety of lynchings leading up to the Tulsa Race Riot of 1921. See Oklahoma Commission to Study the Race Riot of 1921, *TULSA RACE RIOT: A REPORT BY OKLAHOMA COMMISSION TO STUDY THE RACE RIOT OF 1921*, at 27 (2001); OKLA. STAT. ANN. tit. 74, § 8000.1.1 (West 2002) ("The root causes of the Tulsa Race Riot reside deep in the history of race relations in

measures were designed⁷⁶ to and did have a tremendous psychological impact upon African American communities.

The continuous threat of physical violence undoubtedly affected interactions between community members. Family members were prevented from seeking justice for the lynching of a loved one because of the threat that they too would be lynched. Family members were often too frightened to attend the funeral of their lynched loved one.⁷⁷

Alfred Brophy has documented a graphic example of this type of terrorism of African Americans in his account of the variety of “sun down” laws and “nigger drives” established by white citizens in Oklahoma, and specifically designed to terrorize black citizens living there.⁷⁸ These acts of terroristic repression culminated in the Tulsa Race Riot of 1921.⁷⁹ While there is some evidence that the rioters wished to return the African American citizens of Tulsa to a state of slavery,⁸⁰ slavery itself was the historical background out of which the contemporary attitude of discrimination evolved. Although the contemporary attitude is explicable by reference to the culture of discrimination inculcated during slavery, it was the ongoing acts of discrimination that inflicted the injury.

The types of claims arising from Jim Crow era reparations suits present a sufficient nexus between the injury, plaintiff, and defendant to satisfy the type of relation required by most standing laws. That is because the injury—in effect, state-sponsored terrorism—is ideally not asserted by the descendants of the victims, but by the victims themselves. Where such injury is asserted by descendants, it is generally asserted by the victim’s children who can show a pecuniary loss or assert a claim for wrongful death similar to that asserted by the victims under the ACTA. Thus, where descendants sue for Jim Crow violations, the suit should state either that the descendant’s parent has been killed by the state-condoned action (which establishes a claim for wrongful death), or that the plaintiff has suffered a pecuniary loss.

Oklahoma . . . where the goal was to ‘put[] African-Americans in Oklahoma in their place’ and to ‘push down, push out, and push under’ African-Americans in Oklahoma”).

76. See OKLA. STAT. ANN. tit. 74, § 8000.1.1 (West 2002).

77. Sherrilyn A. Ifill, *Creating a Truth and Reconciliation Commission for Lynching*, 21 LAW & INEQ. 263, 288 (2003).

78. See Alfred L. Brophy, *Racial Legislation, Violence, and the Breakdown of Law in the Tulsa Riot Era 35–36* (2003) (unpublished manuscript, on file with author). See also ALFRED BROPHY, *RECONSTRUCTING THE DREAMLAND: THE TULSA RIOT OF 1921: RACE, REPARATIONS, AND RECONCILIATION* (Oxford Univ. Press 2002) [hereinafter BROPHY, *RECONSTRUCTING THE DREAMLAND*].

79. See 1921 Tulsa Race Riot Reconciliation Act of 2001, Bill No. 1178, codified in OKLA. STAT. ANN. tit. 74, § 8000.1 (making legislative findings), § 8201 (Race Riot Memorial), § 8205 (certifying survivors of the Riot), §§ 8221–8225 (Greenwood Area Redevelopment Authority, and OKLA. STAT. ANN. tit. 74, §§ 2621–2626 (Tulsa Reconciliation Education and Scholarship Program). See also BROPHY, *RECONSTRUCTING THE DREAMLAND*, *supra* note 78.

80. See BROPHY, *RECONSTRUCTING THE DREAMLAND*, *supra* note 78. (discussing attitudes of white citizens of Tulsa to African Americans after the Tulsa Riot as expressed in local newspaper articles).

It is possible, however, to deny that even current psychological injury has constitutional significance. This, interestingly, was the position Justice Clarence Thomas took in *Missouri v. Jenkins*.⁸¹ In concurrence, Justice Thomas argued that “[p]sychological injury or benefit is irrelevant to the question whether state actors have engaged in intentional discrimination—the critical inquiry for ascertaining violations of the Equal Protection Clause.”⁸² For Thomas, the basis for finding a constitutional violation—the injury suffered by the plaintiffs—is not the psychological (or social) *effects* of a state’s race-conscious decision, but the race-conscious classification *itself*.⁸³ The idea that racial classifications—the recognition of race when making an official decision—constitute a stigmatic harm is a feature of much of the Supreme Court’s recent jurisprudence.⁸⁴ In part, this marks the culmination of a process that rejects the *effect* of a decision upon a group and looks rather to the *intention* behind that decision,⁸⁵ so that any intentional classification by race becomes injurious, no matter what the effect on the individuals so classified.

Thomas also rejects as profoundly misguided the asserted link between a history of discrimination and present social disadvantage, on the grounds that tracing present disadvantage to past causes itself inflicts a psychological injury. Focusing on the historical link between discrimination and disadvantage promotes the practice whereby “people identify themselves as victims and make demands on the political systems for special status and entitlements.”⁸⁶ This “ideology of victimhood” results from “the practice of blaming circumstances for one’s situation rather than taking responsibility for changing things for the better.”⁸⁷ So, for Thomas, a race-based demand for remediation premised upon a claim that state or national institutions have engaged in a continuing pattern of discrimination is itself evidence of a psychological injury—the failure to “fight

81. 515 U.S. 70 (1995).

82. *Id.* at 121 (Thomas, J., concurring).

83. *See id.* (Thomas, J., concurring) (“[S]egregation violated the Constitution because the State classified students based on their race.”).

84. The Court’s voting rights jurisprudence identifies the “special harms” associated with “personally be[ing] subjected to a racial classification” under the redistricting plan as a sufficient injury to assert a claim under the Equal Protection Clause. *United States v. Hays*, 515 U.S. 737, 744–45 (1995). *See also* *Miller v. Johnson*, 515 U.S. 900, 903, 916 (1995) (“race was the predominant factor motivating legislative decision” to place significant numbers of voters within particular districts); *Shaw v. Reno*, 509 U.S. 630, 644 (1993) (redistricting was so bizarre it would have been inexplicable on grounds other than race).

85. *See, e.g.*, *Keyes v. School Dist. No. 1, Denver*, 413 U.S. 189, 208 (1973) (“[T]he differentiating factor between *de jure* segregation and so-called *de facto* segregation . . . is purpose or intent to segregate.”); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1975); *Washington v. Davis*, 426 U.S. 229, 239 (1976); *Jenkins*, 515 U.S. at 115 (Thomas, J., concurring); *see also* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

86. Hon. Clarence Thomas, *Victims and Heroes in the “Benevolent State,”* 19 HARV. J.L. & PUB. POL’Y 671, 674 (1996) (address at the Eighth Annual Federalist Society Lawyers Convention).

87. *Id.* at 671.

through” disadvantage and succeed against the odds.⁸⁸ To the extent that “our political and legal systems now actively encourage people to claim victim status and to make demands on society for reparations and recompense,” they inflict a psychological injury, rather than remedy one.⁸⁹

In this context, it is worth considering the sorts of “perpetratorless” injuries suffered by hundreds of thousands of Americans each year. Nature visits disaster regularly upon these shores through fire, flood, earthquake, mudslide, hurricane, and tornado. Many of the victims deliberately choose to live in areas prone to these catastrophes, and equally deliberately fail to (or just cannot) obtain insurance against such disasters. Yet they feel—and under one way of understanding the issue, rightly so—that there is some sort of injustice heaped upon them when their homes, and potentially their lives, are destroyed. When such individuals petition the state and federal government for disaster relief, they are, in part, identifying themselves as victims so as to make a demand on the political system for a special status and entitlement. They too are playing the victim game, shaking their fists at nature or fate. Yet, not only are such individuals rarely criticized, but also often we, as a society, endorse the payment of some form or reparative compensation and feel justified in so doing.⁹⁰ Nonetheless, it is clear that were such a claim to be made along racial lines, it is the race-based nature of the demand, and nothing else, that Justice Thomas would find objectionable.⁹¹

Where an identifiable perpetrator is at hand, asserting a right to compensation is often regarded as a healthy, even essential, part of personhood. Jeffrie G. Murphy has argued that “a person who does not resent moral injuries done to him . . . is almost necessarily a person lacking in self-respect.”⁹² Part of the process of the victim establishing a sense of self-esteem is the seeking of reparation or compensation from the perpetrator. This position is endorsed by Harvard Professor Charles Ogletree, who identifies:

the demand for reparations—or restitution—[a]s precisely the end of victimhood. It represents the moment at which we assert our independence, personal integrity, and humanity. By asserting our right to reparations, we assert the right to be respected as individuals and as equals, and treated accordingly. We assert the right

88. Thomas contends “the idea that government can be the primary instrument for the elimination of misfortune is a fundamental misunderstanding of the human condition.” *Id.* at 682.

89. *Id.* at 672–73.

90. *See supra* note 4.

91. In fact, this is precisely the situation faced by individuals who claim that facially neutral policies or practices have a disparate impact upon them. In *Washington v. Davis*, the Supreme Court rejected disparate impact, on its own, as a basis for establishing a violation of the Fourteenth Amendment, and required, in addition, a showing of a racially discriminatory animus behind the policy or practice. *See* 426 U.S. at 239

92. JEFFRIE G. MURPHY & JEAN HAMPTON, *FORGIVENESS AND MERCY* 16 (Cambridge Univ. Press 1988).

to receive the compensation due to anyone who has suffered a deprivation.⁹³

A caveat is that the demand for reparations may be fully justified—and therefore not just the special pleading of the professional “victim”⁹⁴—only where the appropriate relation to the claimed injury is established. This is clearly the case, for example, in the Jim Crow litigation where the survivor plaintiffs had their homes destroyed by the state and municipal governments.⁹⁵ The upshot is that it is not enough, from a legal point of view, for reparations advocates to claim only that slavery was wrong and was in-and-of-itself an injury. We need to demonstrate that there is some continuing injury suffered by particular defendants, and that they are entitled to have that injury remedied. Establishing such a relationship demonstrates the irrationality of a position like Thomas’ that denies one group the right to redress for a palpable injury simply because that injury is inflicted on the basis of race, rather than gender, religion, or some other group characteristic not usually subjected to the charge of special pleading or “victimology.”

C. *Outside Hereditary Injury: The California Reparations Litigation Strategy*

A final option, and one utilized by two slavery reparations lawsuits currently on file, is to sue corporations under CAL. BUS. & PROF. CODE § 17200.⁹⁶ From the perspective of the standing relation, the California statute has significant advantages. So long as there is an enduring defendant—a corporation or a successor in interest—that defendant will be liable for the commission of any “unlawful, unfair or fraudulent business act or practice.” The type of wrong contemplated by the California statute is not particularly narrow: it includes almost “anything that can properly be called a business practice and that at the same time is forbidden by law.”⁹⁷ Such a wrong need not endure. It is the fact that the corporation engaged in the wrongful business practice that permits the suit, not that the corporation is currently so doing. Finally, under the California private attorney general doctrine, anyone may bring suit on behalf of the State of California where the public interest is implicated.⁹⁸ Accordingly, this liti-

93. Charles J. Ogletree, Jr., *The Current Reparations Debate*, 36 U.C. DAVIS L. REV. 1051 (2003).

94. Armstrong Williams, *Reparations Reverie*, WASH. TIMES, Jan. 5, 2001, at A15.

95. See, e.g., *Alexander v. Governor of Okla.*, No. 03CV133E (N.D. Okla. Feb. 24, 2003) (suit brought on behalf of survivors of the Tulsa Race Riot of 1921 and descendants of the victims of that riot, suing the governor of Oklahoma, the city of Tulsa, the Tulsa chief of police, and the Tulsa Police Department, for damages and injunctive relief under the Fourteenth Amendment and 42 U.S.C. §§ 1981, 1983, and 1985, as well as for supplemental state law claims).

96. See *Hurdle v. FleetBoston Fin. Corp.*, No. 02-CV-4653 (N.D. Cal. Jan. 17, 2003); *Hurdle v. FleetBoston Fin. Corp.*, No. CGC-020412388 (Cal. Super. Ct. Sept. 10, 2002).

97. *Smith v. State Farm Mut. Ins. Co.*, 113 Cal. Rptr. 2d 399, 414 (Cal. Ct. App. 2001). The remedies authorized by the act include injunctive relief and restitution. CAL. BUS. & PROF. CODE § 17203 (West 2004).

98. See CAL. CIV. PROC. CODE § 1021.5 (West 2004).

gation avoids the problems of standing that affect the more traditional lawsuits and which arise in the federal contexts, and so produces a plaintiff that represents the whole community.

The major benefit of the private attorney general statute also presents its major drawback for reparations lawsuits. Assuming the named plaintiff can obtain representative status for the class of plaintiffs she proposes to represent, she may have only an attenuated relation with the interest she seeks to represent in litigation.⁹⁹ In the reparations lawsuit, the actual plaintiffs are long dead although the defendants are not: the defendants are the current instantiation of a corporation that at some point in the past supported slavery, which constitutes an unfair business practice. The issue becomes: what relief is appropriate, and who gets it? Generally, the assumption in civil rights litigation is that individuals who are descended from slaves are entitled, by virtue of that relation, to some form of recompense. An alternative theory, and one pressed by Professor Ogletree, is a social welfare-type program for those socially disadvantaged or “bottom-stuck” African Americans who have missed out on the American Dream.¹⁰⁰ This type of payment has been criticized because it relies on a form of “public welfare” relief that is too different from the types of relief courts are traditionally entitled to grant. It risks being too small, and failing to address the continuing problems bequeathed society by the United States’ history of slavery and Jim Crow.¹⁰¹

One way of dealing with this issue may be the *cy pres* doctrine, which was originally developed in the law of charitable trusts. Where the testator’s specific bequest cannot be implemented but her general charitable intent can, then that next-best use will be effectuated.¹⁰² In general, the *cy pres* doctrine applies in class actions in two general situations:

because all class members cannot be located and notified of their right to submit a claim for damages . . . [or because] individual damages may be so small that notification and distribution costs exceed the recoverable amount or reduce it to a pittance. In either event, the courts and attorneys are challenged with designing a distribution scheme that best benefits the uncompensated class members while minimizing management costs and judicial involvement.¹⁰³

The *cy pres* doctrine works within the traditional class action formula: it is parasitic on the normal forms of class relief rather than an alternative to them. The doctrine does, however, pose a significant challenge for repa-

99. This may be a major stumbling block to class certification.

100. Charles J. Ogletree, Jr., *Litigating the Legacy of Slavery*, N.Y. TIMES, Mar. 31, 2002, § 4, at 9.

101. See Keith N. Hylton, *A Framework for Reparations Claims*, 24 B.C. THIRD WORLD L.J. 31, 32–33 (2003). Hylton argues that there is no direct link to be made between investment in community programs and broad uplift for African Americans. *Id.* at 34–35.

102. Stewart R. Shepherd, *Damage Distribution in Class Actions: The Cy Pres Remedy*, 39 U. CHI. L. REV. 448, 452 (1972).

103. Natalie A. DeJarlais, Note, *The Consumer Trust Fund: A Cy Pres Solution to Undistributed Funds in Consumer Class Actions*, 38 HASTINGS L.J. 729, 729–30 (1987).

rations activists—that of developing forms of reparations programs that are acceptable to both a court and the African American community.¹⁰⁴

These litigation options do, however, short-circuit the major problem with reparations lawsuits: finding current plaintiffs able to bring a reparations lawsuit by demonstrating that the historical injury currently impacts them. Put differently, it is not clear that the combination of statutes permitting private attorney general suits and punishing unfair business practices, allied with the *cy pres* doctrine, provides a generalizable litigation solution. There are, however, other avenues through which to explore the development of a heritable injury and relation to state *and* private plaintiffs.

IV. EXPLORING OUR RELATION TO SLAVERY USING LITIGATION

The major theme of this Article has been to argue that the presumption that an individual is descended from African American slaves is insufficient to establish the form of relationship generally required to obtain legal relief. Relief must be based upon some currently obtaining relationship, and in the civil rights sphere has usually been established by the continuing effects of historical discrimination. The Supreme Court has, however, become less receptive to such claims and will permit them only in certain narrow and exceptional situations.

I have suggested that the Jim Crow style of litigation avoids the standing issues associated with slavery litigation. Jim Crow is not the heart of the reparations debate, however; slavery is. The pressing question for advocates of reparations through litigation is how to establish standing to bring suit on behalf of slaves.

The task for reparations advocates is to state an injury that endures for a sufficiently lengthy period of time. The injury must last from slavery to the present. Furthermore, the defendant must still be around and available to pay damages or cease inflicting the injury. Finally, the current plaintiff must be able to establish some relation to the injury and the defendant sufficient to bring suit.

In principle, it should be possible to find defendants. If the *In re African American Slave Descendants Litigation* was successful as anything other than a publicity exercise, it was in demonstrating that there may be some defendants against whom suit could be brought. These defendants, if not states or municipalities, are corporate entities perpetrating a slavery-based injury upon the plaintiffs.

The most promising avenue for the necessary type of injury would seem, *prima facie*, to be property law. The Court in *In re African American Slave Descendants Litigation* suggested some impediments to property-based slavery claims:

Plaintiffs' claim to the economic wealth of their ancestors' labor is conjectural. While most would like to assume that they will be the beneficiaries of their ancestors' wealth upon their demise, this is a mere assumption. Plaintiffs can only speculate that their ancestors' estates would have been passed on to them, and cannot say that

104. Judge Norgle did not rule on the California state standing issue.

they would have inherited their ancestors' lost pay. This is insufficient to show a personal injury to Plaintiffs.¹⁰⁵

There may be plaintiffs who can satisfy the roadblock the Court erected.¹⁰⁶ If so, it would be ironic indeed, given that treating humans as property is the fundamental wrong of slavery.

105. *In re African American Slave Descendants Litig.*, 304 F. Supp. 2d at 1048.

106. Judge Norgle also suggested that the political question doctrine would preclude recovery for property rights. *See id.* at 1055. Judge Norgle's analysis of the political question doctrine depends, however, on his assertion that any slave descendants' claims are precluded because they have already been adjudicated by Congress or the Executive Branch under the War Powers doctrine. It is certainly correct that the ability of courts to interfere in the Government's "War Power" may be limited by the political question doctrine. However, the War Power is a subsidiary part of the executive and legislative power to engage in foreign relations.

For example, the Supreme Court decided the issue of settlement of claims under the President's war power and power to make executive agreements with other countries jointly. *Am. Ins. Ass'n v. Garmendi*, 539 U.S. 396 (2003). The Court emphasized the international dimensions of the President's power, holding that:

The executive agreements at issue here do differ in one respect from those just mentioned insofar as they address claims associated with formerly belligerent states, but against corporations, not the foreign governments. But the distinction does not matter. Historically, wartime claims against even nominally private entities have become issues in international diplomacy, and three of the postwar settlements dealing with reparations implicating private parties were made by the Executive alone. Acceptance of this historical practice is supported by a good pragmatic reason for depending on executive agreements to settle claims against foreign corporations associated with wartime experience. As shown by the history of insurance confiscation mentioned earlier, untangling government policy from private initiative during war time is often so hard that diplomatic action settling claims against private parties may well be just as essential in the aftermath of hostilities as diplomacy to settle claims against foreign governments. While a sharp line between public and private acts works for many purposes in the domestic law, insisting on the same line in defining the legitimate scope of the Executive's international negotiations would hamstring the President in settling international controversies. *Id.* (citations omitted).

The Ninth Circuit considered the War Power as part of the power to engage in foreign relations. As Judge Reinhardt explained in *Deutsch v. Turner Corp.*, 324 F.3d 692 (9th Cir. 2003):

While neither the Constitution nor the courts have defined the precise scope of the foreign relations power that is denied to the states, it is clear that matters concerning war are part of the inner core of this power.

....

... [T]he Constitution allocates the power over foreign affairs to the federal government exclusively, and the power to make and resolve war, including the authority to resolve war claims, is central to the foreign affairs power in the constitutional design. In the absence of some specific action that constitutes authorization on the part of the federal government, states are prohibited from exercising foreign affairs powers, including modifying the federal government's resolution of war-related disputes.

Id. at 711, 713–14.

Finally, in the two cases most heavily relied upon by Judge Norgle, *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 448–56, 483–84 (D.N.J. 1999), and *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248, 265–73, 283 (D.N.J. 1999), both courts held that the

V. CONCLUSION

The purpose of this Article has been to suggest that descent from slaves, without more, is insufficient to establish the necessary legal relation that would entitle African Americans to some form of reparations. That “more” is the continuing legacy of slavery and segregation that condemns large sections of the community to second-class status on the basis of race alone. One-shot litigation solutions based on a history of discrimination, without more, are unlikely to succeed while the Court remains hostile to race-conscious redistributive justice. There are, however, a variety of different ways to litigate reparations, one of which is the type of lawsuit currently on file in Tulsa. Slave lawsuits are possible against corporations under the California Code, but that model is unlikely to extend beyond that state. Nonetheless, the institution of property may provide the type of enduring relation that permits reparations advocates to start seeking reparations for the wrongs of slavery. The diverse forms of property, its enduring character, and the different relations it establishes between individuals, may provide a subtle and profound way to engage in slavery reparations lawsuits.

power to interfere with the foreign policy decisions of the executive or legislative were limited by the power to resolve war as determined under the foreign relations power.

It is certainly not clear that the foreign relations power to engage in treaties at the end of a war is applicable in the Civil War context. It is less obvious that the Thirteenth, Fourteenth, and Fifteenth Amendments should be read as reparations treaties in the manner of the various treaties that explicitly discussed reparations for victims of the War and provided a variety of means by which victims could recover reparations independently of a private right of action. See *Deutsch*, 324 F.3d at 712–13.