
**THE DEATH KNELL TOLLS FOR REPARATIONS IN
IN RE AFRICAN-AMERICAN SLAVE DESCENDANTS
LITIGATION**

CHRISTINA E. LUTZ*

Cite as: Christina E. Lutz, *The Death Knell Tolls for Reparations in In re African-American Slave Descendants Litigation*, 3 SEVENTH CIRCUIT REV. 532 (2008), at <http://www.kentlaw.edu/7cr/v3-2/lutz.pdf>.

INTRODUCTION

The Seventh Circuit, in its recent decision, *In re Slave Descendants Litigation*, dismissed the claims of plaintiffs seeking disgorgement of the profits earned by Northern companies as a result of their illegal involvement in slavery.¹ It is the latest in a long line of reparations cases dismissed by courts for various reasons, including lack of standing and statute of limitations.

Part One of this Comment outlines the history of Northern involvement in slavery. Part Two traces the legal hurdles faced by African American plaintiffs during and after the statutory time period in which to bring reparations claims. Part Three explores the law of reparations, and the relevant case law. Part Four of this Comment delineates the holdings of the district court and the Seventh Circuit opinion in *Slave Descendants*. Part Five explains the various tolling doctrines available to courts to remedy time-barred claims. Part Six

* J.D. candidate, May 2008, Chicago-Kent College of Law, Illinois Institute of Technology; B.A. 2000, Swarthmore College.

¹ *In re African American Slave Descendants Litigation* (“*Slave Descendants*”), 471 F.3d 754, 763 (7th Cir. 2006).

outlines the manner in which the court should have applied the standard for equitable estoppel, and the considerations of efficiency, equity, and history such an application would have satisfied.

I. NORTHERN INVOLVEMENT IN SLAVERY

Slavery was an incredibly profitable endeavor that supported America's economy in its infancy.² However, many Americans are not aware of the North's extensive involvement in slavery. To remedy that knowledge gap, *Hartford Courant* reporters Anne Farrow, Joel Lang, and Jenifer Frank recently published *Complicity: How the North Promoted, Prolonged, and Profited from Slavery*.³ In it, they chronicle the history of slavery in the North as well as the involvement of Northern companies in slavery. Though most people know that farmers and plantation owners in Southern states enslaved Africans and their descendants, the Northern system of slavery is far less infamous. In the 1760s, residents of Northern states, including New York, New Jersey, Pennsylvania, and Delaware, owned and housed as many as 41,000 Africans.⁴ Just as their Southern counterparts did, Northern slave owners bought and sold their slaves, separating children from parents and husbands from wives. Northern slaves slept on floors in attics, cellars, and barns, without blankets or clothing, where conditions were far colder than in the South.⁵ They could not freely travel, associate or educate themselves under the law.⁶ Slave owners routinely whipped slaves of all ages for violating these rules, or for any number of other reasons, and received no punishment for murdering a slave.⁷

² Burt Neuborne, *Holocaust Reparations Litigation: Lessons for the Slavery Reparations Movement*, 58 N.Y.U. ANN. SURV. AM. L. 615, 620 (2003).

³ ANNE FARROW, ET AL., *COMPLICITY: HOW THE NORTH PROMOTED, PROLONGED, AND PROFITED FROM SLAVERY* (2006).

⁴ *Id.* at 62.

⁵ *Id.* at 63.

⁶ *Id.*

⁷ *Id.* at 62.

At the same time, Northern slave trading posts supplied the demands of Northern residents for slaves.⁸ Rhode Island had a virtual monopoly on the “importation” of slaves, and controlled more than two-thirds of the American colonies’ slave trade with Africa.⁹ After Congress banned the trafficking of African slaves in 1808, Rhode Island continued to import slaves.¹⁰ As late as 1860, after the slave trade in Rhode Island had waned, New York City was the American capital of a massive international illegal slave trade, supplying slaves to markets in Brazil and Cuba.¹¹ New Yorkers built and sold slave ships designed to transport 600 to 1000 people each; the ships contained crates of shackles and large water tanks.¹² Slave traders generally evaded prosecution or bribed juries if indicted.¹³ When a Northern court convicted one notorious New York slave trader in 1861, 11,000 of his outraged fellow New Yorkers petitioned Abraham Lincoln to pardon him.

II. AFRICAN AMERICAN ACCESS TO COURT SYSTEMS

While the Civil War unequivocally changed America, it did not ameliorate slavery’s effects. The composition of the Union army evidenced the change. By 1865, one out of every four Union soldiers was African American—either Northern free blacks or escaped slaves.¹⁴ In the antebellum South, these same soldiers did not enjoy what was termed in the nineteenth century “the basic rights of personhood under the law.”¹⁵ Blacks were excluded from the right to marry, follow trade, travel, own land or property, enter into contracts,

⁸ *Id.* at 95.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 112.

¹² *Id.* at 121.

¹³ *Id.* at 122.

¹⁴ GARRETT EPPS, *DEMOCRACY REBORN: THE FOURTEENTH AMENDMENT AND THE FIGHT FOR EQUAL RIGHTS IN POST-CIVIL WAR AMERICA* 20 (2006).

¹⁵ *Id.* at 31.

testify in court, and seek judicial remedy.¹⁶ The Framers of the Constitution viewed these civil rights as more fundamental than political rights. Political rights included the right to serve on juries and the right to vote, and the Framers granted political rights only to white land-owning men.¹⁷ This hierarchy of rights endured through the Civil War and into Reconstruction, where a reunified America countenanced at most only fundamental civil rights for African Americans.¹⁸ Though the Thirteenth Amendment abolished slavery in 1865, Southern States adopted “Black Codes” in response that denied blacks the citizenship rights granted to them by the Thirteenth Amendment.¹⁹ Congress ratified the Fourteenth Amendment to grant civil rights to African Americans, notwithstanding strong dispute from formerly Confederate states and several Northern states, including New Jersey, Ohio, and Oregon.²⁰

In 1873, The Supreme Court confronted the Fourteenth Amendment in *The Slaughter-House Cases*.²¹ The Court narrowly interpreted the Fourteenth Amendment to guarantee only federal enforcement of the privileges and immunities of citizenship, but left states free to determine the citizenship status of its residents individually.²² The Court restricted the power of the Fourteenth Amendment further in the 1883 *Civil Rights Cases*.²³ There the court held that the Fourteenth Amendment barred only discrimination in state action, but that private racial discrimination was an unprotected social matter.²⁴ The Court thus granted judicial approval to the

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 31-32.

¹⁹ Norman Redlich, “*Out, Damned Spot; Out, I Say.*” *The Persistence of Race In American Law*. 25 VT. L. REV. 475, 484 (2001).

²⁰ *Id.* at 240-253.

²¹ 83 U.S. 36 (1873).

²² Charles J. Ogletree, Jr., *From Brown to Tulsa: Defining Our Own Future*, 47 How. L. J. 499, 501 (2004).

²³ 109 U.S. 3 (1883).

²⁴ *Id.*

division between civil, political, and social rights, protecting only the most fundamental of civil rights for blacks.²⁵ This approach was sanctioned by Congress, since many of its members from both the North and South were uncomfortable with the concept of African Americans as social equals.²⁶

In *Plessy v. Ferguson*, the Court continued its trend of separating civil and social rights.²⁷ The Plaintiff in *Plessy* was an African American male who purchased a first class train ticket, but was instructed by the train's conductor to move to the second class smoking car or disembark the train.²⁸ Mr. Plessy argued that the Louisiana state law that segregated railroad cars was unconstitutional. The Court held that "equal, but separate" segregated rail coaches did not violate the Fourteenth Amendment.²⁹ The Court's decision demonstrates the fallacy of separate but equal; that first class cars were "better" than second class ones is discernible from their descending monikers and price. While *Plessy* intended to further separate civil from social rights, it simultaneously demonstrated that blacks did not have meaningful access to either type of right. Where Mr. Plessy entered into a contract for a first class ticket, his race entitled him to only a second class one. While subsequent decisions in the 1940s and 1950s found that black students were entitled to admission to various graduate schools on equal protection grounds, the Supreme Court did not overturn *Plessy*.³⁰

Political and fundamental civil rights were also unavailable to blacks in the first half of the Twentieth century. Many Southern states disenfranchised African Americans by enacting "grandfather clauses," which made having an ancestor that was a legal citizen during slavery

²⁵ Redlich, *supra* note 19, at 484.

²⁶ *Id.*

²⁷ 163 U.S. 537 (1896).

²⁸ *Id.* at 538.

²⁹ *Id.* at 547.

³⁰ *See, e.g.*, *Sipuel v. Bd of Regents of the Univ. of Okla.*, 332 U.S. 631 (1948); *Sweat v. Painter*, 339 U.S. 629 (1950).

a requirement of voting.³¹ Others held whites-only primaries, which the Supreme Court held were constitutional until its decision in *Smith v. Allwright* in 1944.³² Even freedom from enslavement was not certain, and many African Americans agricultural workers returned to virtual slavery in a system known as peonage. Black farm workers toiled for money that was often printed by the plantation owners themselves, and redeemable only at the plantation store.³³ Another common example of peonage was where plantation owners entered into contracts with black farm workers with no intent to ever pay them; the system endured well into the 1940s thanks to state statutes that protected it.³⁴

While peonage was common in the agricultural South, access to civil, political, and social rights was far from easy in the North for African Americans. Between 1880 and 1930, seventy-nine blacks were lynched in the North.³⁵ Racial riots were common, and the City of Chicago allowed rioters to attack African Americans and their property for four days until it intervened; over 500 people were injured.³⁶

While the basic safety of African Americans may have improved in the period after the Supreme Court found public segregation unconstitutional in *Brown v. Board of Education*, that decision did not immediately improve social rights for blacks.³⁷ Many schools in Northern and Midwestern states, such as Delaware and Missouri, remained segregated well into the 1960s in violation of *Brown*.³⁸ Even where states complied with *Brown*, schools remained segregated due

³¹ Ogletree, *supra* note 22.

³² 321 U.S. 649 (1944).

³³ Ogletree, *supra* note 22.

³⁴ MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS, THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 233 (2004). See also *Taylor v. Georgia*, 315 U.S. 25 (1942) and *Pollock v. Williams*, 322 U.S. 4 (1944), holding that Georgia and Florida peonage statutes were unconstitutional.

³⁵ Ogletree, *supra* note 22, at 503.

³⁶ *Id.*

³⁷ *Brown v. Board of Ed. of Topeka*, 347 U.S. 483 (1954).

³⁸ KLARMAN, *supra* note 34, at 347.

to residential patterns, known as de facto segregation.³⁹ De facto segregation currently continues to deprive African American children of education. A 1973 lawsuit attempted to remedy this problem in Denver; however, the Supreme Court refused to find that de facto segregation was a violation of *Brown*.⁴⁰ In *Keyes v. School District No. 1*, the Supreme Court held that only segregation that results from intentional government action (de jure segregation) violates Equal Protection.⁴¹ Just recently, the Court held that school attendance schemes in Seattle and Louisville intended to remedy de facto segregation and provide the benefit of integrated schooling to all students violated Equal Protection to white students under the Fourteenth Amendment.⁴² In a vehement dissent, Justice Breyer argued that the plurality decision broke the promise of *Brown*.⁴³ “This is a decision that the Court and the Nation will come to regret,” he portended.⁴⁴

In the decisions subsequent to *Brown*, the Court’s jurisprudence maintained the racial status quo rather than remedied it. In 1976, the Court in *Washington v. Davis* held that an Equal Protection violation requires a “discriminatory purpose,” rather than merely a discriminatory effect.⁴⁵ As noted reparations scholar Charles Ogletree pointed out, Justice Blackmun believed his colleagues misperceived the state of racial inequality in the late 1980s.⁴⁶ In Justice Blackmun’s dissent from an opinion finding that a class of salmon cannery workers failed to establish the racism they experienced in the workplace was a constitutional violation in their employment, Blackmun described the workers’ employment setting as being “organized on principles of

³⁹ *Id.*

⁴⁰ Redlich, *supra* note 19, at 496.

⁴¹ *Keyes v. School District No. 1*, 413 U.S. 189 (1973).

⁴² *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 127 S. Ct. 2738, (2007).

⁴³ *Id.* at 2837

⁴⁴ *Id.*

⁴⁵ *Washington v. Davis*, 426 U.S. 229 (1976).

⁴⁶ Ogletree, *supra* note 22, at 498.

racist stratification and segregation. In more blatant language, Justice Stevens stated that the workplace conditions, responsibilities, and housing were so inferior for black workers as to create a virtual “plantation economy.”⁴⁷ Justice Blackmun lamented, “[o]ne wonders whether the majority still believes that race discrimination . . . is a problem in our society, or even remembers that it ever was.”⁴⁸

The current collective consciousness of America and the jurisprudence of the Supreme Court embody the shortsightedness that so disturbed Justice Blackmun. The country and the Court are laboring under the myth of a post-racist society, as evidenced by the lack of success of slavery reparations litigation. Reparation suits, which seek restitution for slavery, are naturally met with hostility in a legal system that refuses to acknowledge the continuing effects of slavery on the black community. In light of the legal history recounted here, one feels the same incredulity that Justice Blackmun did when Judge Posner stated in *Slave Descendants* that African Americans could have successfully brought reparations claims within the early part of the last century.⁴⁹ In which Twentieth Century court would African Americans have had meaningful access to restitution for slavery: that which denied their most basic rights, or that which pretended they have always had those rights?

III. HISTORY OF REPARATIONS

In order to understand the significance of the *Slave Descendants* decision, we must explore its place in the continuum of reparations jurisprudence. Reparations refers to any legal or political scheme that 1) provides payment (in cash, trust, or social programs) to a large group of claimants, 2) based on wrongs permitted under the law at the time, 3) which current law may bar through a strict application of sovereign immunity, statute of limitations or standing, and 4) which

⁴⁷ *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 662 (1989).

⁴⁸ *Id.*

⁴⁹ *In re African American Slave Descendants Litigation* (“*Slave Descendants*”), 471 F. 3d 754, 762 (7th Cir. 2006).

principles of corrective justice and restitution justify.⁵⁰ The third part of its definition demonstrates that reparations are a problematic pursuit. The traditional paradigm of a plaintiff recovering from a defendant that wronged her in the recent past works poorly where defendant's wrong is a systematic denial of plaintiff's access to civil, political, and social rights and opportunities, for the purpose of preserving defendant's sociopolitical dominance over plaintiff.⁵¹

Reparations suits arise from abhorrent wrongs. Past cases include class action litigation for recovery from the government for the internment of Japanese-American citizens during World War II, and claims against German companies for their unjust profits from the use of slave labor during the same time.⁵² The difficulty of success in reparations suits demonstrates that courts often do not believe that the gravity of such injuries outweigh legal formalities such as statutes of limitations.⁵³ However, these lawsuits resulted in legislation or extra-judicial agreements for restitution each in the amount of more than one billion dollars.⁵⁴

Courts summarily dismissed early African American reparations litigation. In *Johnson v. McAdoo*, plaintiffs were former slaves and descendants of slaves that sought an equitable lien on U.S. Treasury funds acquired during slavery from cotton taxes.⁵⁵ In one short paragraph, the court held that the true defendant was not the U.S. Treasurer, as named in the suit, but instead the U.S. government, which was immune from suit.⁵⁶

⁵⁰ Eric A. Posner and Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689, 691 (2003).

⁵¹ Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*, 40 B. C. L. REV. 477, 488 (1998).

⁵² *Hohri v. United States*, 586 F. Supp. 769 (D.D.C. 1984), *aff'd in part, rev'd in part*, 782 F. 2d 227 (1986), *vacated*, 482 U.S. 64 (1987), *on remand*, 847 F. 2d 779 (1988), *cert. denied*, 488 U.S. 925 (1988); *D'Amato v. Deutsche Bank*, 236 F. 3d 78 (2d Cir. 2001).

⁵³ *Id.*; see also, *Slave Descendants*.

⁵⁴ Yamamoto, *supra* note 51, at 696, Tables 1 and 2.

⁵⁵ *Johnson v. McAdoo*, 45 App. D. C. 440 (1916).

⁵⁶ *Id.* at 441.

Subsequent suits were also unsuccessful. In an unreported decision, the Northern District of California dismissed plaintiff's claim to the 40 acres and a mule, or the cash equivalent, guaranteed to his descendants by the Freedman's Bureau after the Civil War.⁵⁷ It reasoned that plaintiff's case reinforced the need for statutes of limitations in order to "prevent surprises through the revival of claims."⁵⁸ One year later, the same court dismissed a claim against the United States for damages from slavery, which the Ninth Circuit affirmed on the grounds of sovereign immunity, lack of standing, and statute of limitations.⁵⁹ In *Cato v. United States*, the plaintiffs analogized their claim to Native American reparations claims in which the statute of limitations was tolled for far longer than plaintiffs requested, but the court differentiated the African American plaintiffs because they did not have an analogous treaty relationship with the federal government.⁶⁰ The court concluded that continuing discrimination did not toll the statute of limitations, either.

More recently, plaintiffs brought a suit seeking restitution for slavery pursuant to the Civil Liberties Act ("CLA"), an act which Congress intended to remedy the injustice of Japanese-American internment during World War II.⁶¹ Plaintiffs claimed that denying their claims under the CLA violated the Equal Protection and Due Process Clauses of the Fifth and Fourteenth Amendments.⁶² The court held that the CLA barred claims of non-Japanese citizens and the act survived judicial scrutiny.⁶³ It reasoned that there are many other groups that have been wronged by the "unhappy aspects of American history" that

⁵⁷ *Berry v. United States*, No. C-94-0796-DLJ, 1994 WL 374537 at *3 (N.D. Cal. 1994).

⁵⁸ *Id.*

⁵⁹ *Cato v. United States*, 70 F. 3d 1103 (9th Cir. 1995).

⁶⁰ Alfred L. Brophy, *Some Conceptual and Legal Problems in Reparations for Slavery*, 58 N.Y.U. ANN. SURV. AM. L. 497, 513 (2003).

⁶¹ *Obadele v. United States*, 52 Fed. Cl. 432 (Fed. Cl. 2002), *affirmed per curiam*, 61 Fed. Appx. 705 (Fed. Cir. 2003).

⁶² *Id.* at 441.

⁶³ *Id.*

the CLA does not address, and so the Act's application to Japanese Americans did not extend to African Americans.⁶⁴

Those “unhappy aspects of American history” were the cause of a reparations suit based on a race riot in Tulsa, Oklahoma in 1921. Though not a slavery reparations case the plaintiffs in *Alexander v. Oklahoma* did argue that the court should apply an equitable tolling doctrine to claims barred by statute of limitations. *Alexander* demonstrates the difficulty experienced by plaintiffs in even the strongest and most recent reparations cases.⁶⁵ A young African American male had been accused of assaulting a white teenage girl.⁶⁶ Fearing a lynching, about fifty black residents of the African American neighborhood in Tulsa, known as Greenwood, went to the jail to stop it.⁶⁷ White residents of Tulsa confronted the Greenwood citizens at the courthouse and a melee ensued.⁶⁸ In response, the police department deputized and armed hundreds of white men with machine guns, and the mayor of Tulsa called in the National Guard.⁶⁹ The deputized citizens and the Guardsmen invaded Greenwood in an attempt to destroy it.⁷⁰ A small group of Black World War I veterans attempted to defend their neighborhood.⁷¹ The Guardsmen fired on the town with a machine gun mounted to the top of a truck.⁷² The next day, conditions worsened.⁷³ The Guardsmen arrested and transported the residents of Greenwood to buildings for “protective custody,” while the white deputies burned the newly emptied homes and businesses.⁷⁴ According to the court's findings of fact, the “angry white mob converged on

⁶⁴ *Id.* at 442.

⁶⁵ *See Alexander v. Oklahoma*, 382 F. 3d 1206 (10th Cir. 2004).

⁶⁶ *Id.* at 1211-12.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

Greenwood in a devastating assault . . . killing up to three hundred people, and leaving thousands homeless.”⁷⁵ When the mob finished, it had burned forty-two square blocks of Greenwood to the ground.⁷⁶

On appeal, plaintiffs argued that the court should apply an equitable tolling doctrine to the statute of limitations. They claimed that they could not have discovered the full involvement of the city of Tulsa—which was responsible for deputizing and arming the mob, and for arresting the citizens of Greenwood—until it investigated the events and published a report in 2001.⁷⁷ The court found that the plaintiffs knew of their injury at the time it happened, and that the plaintiff did not need to know the cause of the injury to trigger the statute of limitations.⁷⁸ The court advised that plaintiffs must use reasonable diligence in discovering the facts giving rise to a claim.⁷⁹ However, the court did not address the fact that during the statutory period closely following the riot, Tulsa promised to compensate the victims, but then ignored their requests for compensation.⁸⁰ Nor did it address how a 1920s court in Oklahoma would have realistically received such claims in light of African Americans’ lack of meaningful access to courts at that time.

⁷⁵ *Id.*

⁷⁶ *Id.* at 1212.

⁷⁷ *Id.*

⁷⁸ *Id.* at 1216.

⁷⁹ *Id.*

⁸⁰ Ogletree, *supra* note 22, at 571.

IV. *SLAVE DESCENDANTS* OPINIONS

A. *District Court Opinion*

1. Plaintiffs

Plaintiffs⁸¹ consisting of former slaves alleging post-Civil War enslavement, representatives of slaves, and descendants of slaves, filed nine separate suits in varied jurisdictions seeking reparations on behalf of all African Americans against Defendant companies for their involvement in slavery.⁸² The Judicial Panel on Multidistrict Litigation transferred the suits to the Northern District of Illinois for consolidated proceedings, at which point Plaintiffs filed a consolidated complaint.⁸³ In that complaint, Plaintiffs sought relief in the form of an accounting, disgorgement of profits, restitution, compensatory damages, punitive damages, and the creation of a historical commission to study the actions of Defendant companies and their predecessors in interest.⁸⁴ Plaintiffs also requested that the court disburse monetary awards into a constructive public trust.

⁸¹ Plaintiffs are Deadria Farmer-Paellmann, Mary Lacey Madison, Andre Carrington, John Bankhead, as administrator of the Estate of Edlee Bankhead, Richard Barber, Sr., Hannah Hurdle-Toomey, as administrator of the Estate of Andrew Jackson Hurdle, Marcelle Porter, as administrator of the Estate of Hettie Pierce, Julie Mae Wyatt-Kervin, the Estate of Emma Marie Clark, Ina Bell Daniels Hurdle McGee, Cain Wall Sr., and Antoinette Harrell Miller.

⁸² *In re African-American Slave Descendants Litig.*, 375 F. Supp. 2d 721, 737 (N.D. Ill. 2005).

⁸³ *In re African-American Slave Descendants Litig.*, 304 F. Supp. 2d 1027, 1038 (N.D. Ill. 2004).

⁸⁴ Defendants are FleetBoston Financial Corporation, CSX Corporation, Aetna Inc., Brown Brothers Harriman & Company, New York Life Insurance Company, Norfolk Southern Corporation, Lehman Brothers Corporation, Lloyd's of London, Union Pacific Railroad, JP Morgan Chase, R.J. Reynolds Tobacco Company, Brown and Williamson, Liggett Group Inc., Canadian National Railway, Southern Mutual Insurance Company, American International Group, and Loews Corporation.

2. Plaintiffs Claims against Defendants

In their Second Consolidated and Amended Complaint, Plaintiffs alleged the following: Defendants conspired to commit tortious acts; converted the property rights slaves had in themselves; were unjustly enriched through slave labor; fraudulently concealed a cause of action for replevin from the estates of Plaintiffs; violated Plaintiffs' constitutional rights to inherit and convey property by restricting former slaves' access to corporate records demonstrating Defendants' participation in slavery; intentionally and negligently inflicted emotional distress; and violated state consumer protection laws by fraudulently concealing material facts regarding their involvement in slavery from Plaintiff consumers.⁸⁵

Plaintiffs alleged that the predecessors to Defendant banks made loans to slave traders and collected customs duties on ships transporting slaves.⁸⁶ Defendant railroads are successors-in-interest to railroad lines that were allegedly constructed, in part, by slave labor, and that transported slaves.⁸⁷ Predecessors to Defendant insurance companies allegedly issued insurance policies on the lives of slaves with slave owners as beneficiaries and insured ships transporting slaves.⁸⁸ Defendant Brown Brothers Harriman allegedly accepted slaves as collateral for loans, eventually owning up to 346 slaves.⁸⁹ Significantly, Plaintiffs alleged in most counts that Defendants performed these acts in violation of Northern laws applicable to them at the time, and that Defendants made intentional misrepresentations about their involvement in slavery.⁹⁰

⁸⁵ Second Consolidated and Amended Complaint at ¶ 258-366, *In re African-American Slave Descendants Litig.*, 375 F. Supp. 2d 737 (N.D. Ill. 2005).

⁸⁶ *Id.* at ¶ 125-223.

⁸⁷ *Id.* at ¶ 125-223.

⁸⁸ *Id.*

⁸⁹ *Id.* at ¶ 148.

⁹⁰ *Id.* at ¶ 125-223.

3. Holdings

In his opinion for the Northern District of Illinois, Judge Norgle dismissed Plaintiffs' claims with prejudice.⁹¹ He held that Plaintiffs lacked standing because they did not establish "to a virtual certainty that they have suffered concrete, individualized harms at the hands of Defendants,"⁹² and because their claim to their ancestor's lost wages was "conjectural."⁹³ Plaintiffs also lacked standing, according to Judge Norgle, because their Complaint did not allege a sufficient causal connection between the named Defendants' acts and Plaintiffs' ancestors,⁹⁴ and because Plaintiffs may not assert the legal rights of third-parties by virtue of their ancestry alone.⁹⁵

Judge Norgle agreed with Defendants that the political question doctrine and various statutes of limitations barred Plaintiffs' claims. He held that the issue of reparations was not justiciable because it is political in nature, and the legislative branch acted on the issue when it, for example, created the Freedman's Bureau, ratified the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution, and enacted numerous Civil Rights Acts.⁹⁶ Even if it were justiciable, he held that the statutes of limitations on all but the consumer protection fraud claims would have accrued by 1865 at the latest, and that Plaintiffs did not give "concrete instances of material representations that have been made by Defendants" within the statutory periods.⁹⁷ Judge Norgle declined to toll or delay the accrual of the statutes of limitations because "Plaintiffs' ancestors knew or should have known [either while they were slaves or in the years after Emancipation] that they were being brutalized and wrongfully forced to work," and the

⁹¹ *In re African-American Slave Descendants Litig.*, 375 F. Supp. 2d 721, 737 (N.D. Ill. 2005).

⁹² *Id.* at 747 (internal quotations omitted).

⁹³ *Id.* at 748-9.

⁹⁴ *Id.* at 753.

⁹⁵ *Id.*

⁹⁶ *Id.* at 756-9.

⁹⁷ *Id.* at 773.

defendants did not conceal the injury of slavery because it was “quite obvious when inflicted.”⁹⁸

B. Seventh Circuit Opinion

Judge Posner, in a succinct nine-page opinion for the Seventh Circuit Court of Appeals, modified in part and reversed in part the ruling of the district court.⁹⁹ He held that the political question doctrine did not bar Plaintiffs’ claims because Plaintiffs sought “conventional legal relief” from the court by asking it to apply state and federal law to Defendants’ conduct.¹⁰⁰ However, he dismissed without prejudice all of the claims in the complaint for lack of standing, save for those of the representatives of the slaves.¹⁰¹ He reasoned that Plaintiffs could not possibly connect Defendants’ wrongful acts with their financial harm, and the causal chain would be so long that a court would merely be speculating as to the amount of damages.¹⁰² Judge Posner reached the merits of the claims of plaintiffs representing the estates of former slaves, holding that, as actual slaves, they did have a concrete injury that granted them standing to sue.¹⁰³ However, he dismissed their claims with prejudice as time-barred by the statute of limitations.¹⁰⁴

According to Judge Posner, tolling doctrines do not apply because they cannot extend the time to sue by more than a century.¹⁰⁵ He reasoned that in the years immediately following the Civil War former slaves could have received a fair hearing on these matters in Northern courts, and that the descendants of slaves have had decades of

⁹⁸ *Id.* at 776-9.

⁹⁹ *In re African American Slave Descendants Litigation (“Slave Descendants”)*, 471 F. 3d 754, 763 (7th Cir. 2006).

¹⁰⁰ *Id.* at 758.

¹⁰¹ *Id.* at 763.

¹⁰² *Id.* at 759.

¹⁰³ *Id.* at 762.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

effective access to courts in the South.¹⁰⁶ However, he reversed the dismissal of the consumer protection fraud claims.¹⁰⁷ In a consumer fraud protection claim, where a seller misrepresents information material to some class of buyers fearing he will lose those buyers if they knew the truth, he perpetrates a fraud on those buyers.¹⁰⁸ Judge Posner remanded the consumer protection fraud claims for further proceedings to determine whether Defendants misrepresented information regarding their involvement in slavery to Plaintiffs, causing them to purchase products they would not have purchased otherwise.¹⁰⁹

V. VARIOUS TOLLING DOCTRINES

A. *Equitable Estoppel*

Plaintiffs argued that the court should impose one of the various tolling doctrines to their time-barred claims.¹¹⁰ One such tolling doctrine is the “discovery rule.” According to Judge Posner in *Cada v. Baxter Healthcare Corp.*, the discovery rule does not actually toll, or halt, the statute of limitations, but instead delays its commencement “from the date when the plaintiff is wronged to the date when he discovers he has been injured.”¹¹¹ A doctrine “within the domain of the discovery rule”¹¹² is equitable estoppel, where the defendant takes steps to conceal the injury to the plaintiff, thus delaying the accrual of the statute of limitations until the time when “the plaintiff has discovered . . . or should have discovered, that the defendant injured him.”¹¹³ The defendant is estopped from defending the claim on the

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 763.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 773.

¹¹¹ 920 F. 2d 446, 450 (7th Cir. 1990).

¹¹² *Id.*

¹¹³ *Id.*

grounds that the statute of limitations bars plaintiff's recovery.¹¹⁴ A court may apply equitable estoppel when the plaintiff was not aware of his injury at the time it occurred.¹¹⁵

According to Judge Posner in *Williams v. Sims*,¹¹⁶ the Seventh Circuit outlined a "standard example" of equitable estoppel in *Bell v. City of Milwaukee*.¹¹⁷ In *Bell*, the court found that on the evening of February 2, 1958, two white Milwaukee police officers shot an unarmed African American man who fled from them after they attempted to arrest him for driving with a broken tail-light.¹¹⁸ One officer allegedly stated to the other, "He's just a damn nigger kid anyhow."¹¹⁹ According to the court, the officers planted a knife on the victim, Bell, and claimed that he brandished the knife and confessed to a robbery while fleeing.¹²⁰ Additional police officers allegedly entered into a racially-motivated conspiracy to conceal the crime.¹²¹ Bell's siblings filed suit against the alleged conspirators in 1979 for civil rights violations and various tort claims. Defendants argued that the statutes of limitations for Plaintiffs' claims expired in 1961 and 1964.¹²² The court estopped Defendants from defending on the ground that the statutes of limitations had expired because Plaintiffs alleged that Defendants actively and fraudulently concealed their wrongdoing. It held that equitable estoppel is a "far-reaching doctrine" and that the key inquiry in determining whether it should apply is whether "the defendants' conduct and representations were so unfair and misleading as to outbalance the public's interest in setting a limitation on bringing an action."¹²³ The court held that the public had a stronger interest in

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ 390 F. 3d 958, 958 (7th Cir. 2004).

¹¹⁷ 746 F. 2d 1205, 1229-31 (7th Cir. 1984) (reversed on other grounds).

¹¹⁸ *Id.* at 1216.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 1223.

¹²¹ *Id.*

¹²² *Id.* at 1229

¹²³ *Id.* at 1231.

seeing Plaintiffs' claims litigated than in imposing the statute of limitations because, if true, Defendants' racially-motivated actions were so unfair as to carve out an exception to the statute of limitations.¹²⁴ *Bell* demonstrated that courts should balance the interests of the public in punishing Defendant's wrongdoing with the public's interest in applying the statute of limitations.

B. Equitable Tolling

On the other hand, if the plaintiff *knew* he was injured and did not file a claim within the applicable statute of limitations, equitable tolling may be available to him. Judge Posner explained in *Cada*, if the plaintiff reasonably "cannot obtain information necessary to decide whether the injury is due to wrongdoing and, if so, wrongdoing by the defendant," he may appeal to the doctrine of equitable tolling to toll the statute of limitations for the period of time necessary to obtain the information.¹²⁵ In *Fidelity National Title Insurance Co. of New York v. Howard Savings Bank*, Judge Posner explained, "equitable tolling does not require that the defendant have borne any responsibility for the plaintiff's having missed the deadline."¹²⁶ Thus, equitable tolling applies where plaintiff knew he was injured when it happened, and equitable estoppel applies where plaintiff did not discover he was injured until well after the injury occurred.

VI. ANALYSIS OF TOLLING DOCTRINES IN *SLAVE DESCENDANTS*

Both the trial court and Judge Posner conceive of Plaintiffs' injuries as slavery. The trial court refers to Plaintiffs' injuries as "the institution of slavery itself," and states that Plaintiffs "knew or should have known that they were being brutalized and wrongfully forced to work for people, plantations, companies, and industries without being

¹²⁴ *Id.*

¹²⁵ *Cada v. Baxter Healthcare Corp.*, 920 F. 2d 446, 450 (7th Cir. 1990).

¹²⁶ *Fid. Nat'l Title Ins. Co. of N.Y. v. Howard Sav. Bank*, 436 F.3d 836, 839 (7th Cir. 2006).

compensated.” Judge Posner echoes this sentiment when he declines to apply tolling doctrines in one brief paragraph:

It is true that tolling doctrines can extend the time to sue well beyond the period of limitations—but not to a century and more beyond. Slaves could not sue, and even after the Thirteenth Amendment became effective in 1865 suits such as these, if brought in the South, would not have received a fair hearing. However, some northern courts would have been receptive to such suits, and since the defendants are (and were) northern companies, venue would have been proper in those states. Even in the South, descendants of slaves have had decades of effective access to the courts to seek redress for the wrongs of which they complain. And it's not as if it had been a deep mystery that corporations were involved in the operation of the slave system.¹²⁷

Judge Posner’s assessment of African American access to courts seems revisionist, at best. The history of slavery in the North in the decades preceding the Civil War renders suspect Judge Posner’s reasoning that freed slaves would have received fair reparations trials there.¹²⁸ It is doubtful that in states such as New York, which was the locus of a massive international slave trading post, courts would have been receptive to claims by blacks against those slave traders for reparations. Furthermore, in light of numerous twentieth century Supreme Court decisions recounted in this article which denied African Americans their most basic rights, and failed to redress the harms which still stem from a denial of those rights, it seems naïve to believe that any court in the North or South would have been receptive to reparations claims. After all, there has never been a successful reparations suit.

¹²⁷ *In re African American Slave Descendants Litigation* (“*Slave Descendants*”), 471 F. 3d 754, 762 (7th Cir. 2006).

¹²⁸ Note the October, 2005 exhibit of the New York Historical Society “Slavery in New York” which deems New York the “capital of American Slavery” for two centuries on the exhibit’s website: www.slaveryinnewyork.org.

Of significance here, however, is how Judge Posner mischaracterizes Plaintiffs' injuries in the same manner the trial court did. He states that Plaintiffs have had "decades of effective access to the courts to seek redress for the wrongs of which they complain."¹²⁹ To bring any complaint into court, a plaintiff must know she has been injured. By rejecting Plaintiffs' appeal to the court to apply one of the various tolling doctrines by stating that Plaintiffs should have brought their claim earlier, Judge Posner is also assuming that Plaintiffs' injury is slavery. Judge Posner essentially concludes that since Plaintiffs knew they were enslaved, they therefore cannot seek refuge in any of the various tolling doctrines.

The African American slavery reparations cases mentioned in this article seek compensation for the institution of slavery generally, so Judge Posner's conclusion is understandable, though inappropriate. Unlike prior reparations cases, Plaintiffs here do not seek redress merely for the institution of slavery—an institution that was legal in the South prior to the Civil War. Plaintiffs claim that Defendant companies violated Northern laws against slavery by engaging in the business of slavery, and in some cases, actually owning slaves. This injury is significantly different from the injury of legal slavery, because it changes how the court should apply the various tolling doctrines.

Arguably, a court could properly apply equitable tolling if the injury is legal slavery. Equitable tolling is appropriate where a plaintiff knew she was injured, but could not reasonably find out within the statute of limitations that the injury was the result of wrongdoing, and if so, that defendant committed the wrong. Plaintiffs knew they were legally enslaved. However, Northern companies, such as Defendants, could not own slaves, despite its legality in the South. If Defendants committed such a wrong, and Plaintiffs could not reasonably find out within the statute of limitations that their enslavement was the result of Defendants' illegal involvement in slavery, equitable tolling could apply.

¹²⁹ *Slave Descendants*, 471 F. 3d at 762.

The stronger argument is that the injury Plaintiffs complain of is illegal slavery, though, since Plaintiffs state in their complaint that Defendants were Northern companies engaged in slavery in violation of Northern laws. Equitable tolling does not apply where the injury is illegal, rather than legal, slavery. Plaintiffs argue in their complaint that they could not determine Defendant's illegal involvement in slavery because Defendants concealed that information. Thus, if the injury is illegal slavery, and Plaintiffs could not find out Defendants illegally enslaved them, Plaintiffs could not discover the existence of their injury. Equitable tolling applies only where a plaintiff knows she is injured, and Plaintiffs here claim they did not know about Defendants' involvement in slavery. This analysis does not apply to equitable estoppel, however, where the plaintiff is unaware that her injury exists because defendant concealed the injury.

Only Judge Posner's final reason for rejecting tolling doctrines, that "it's not as if it had been a deep mystery that corporations were involved in the operation of the slave system," alludes to equitable estoppel. By implying that Plaintiffs should have known that corporations (and thus, Defendants) engaged in the business of slavery, Judge Posner considers the possibility that the moment when the statute of limitations accrued was not the time in which Plaintiffs were legally subjugated by the institution of slavery, but was instead when Plaintiffs discovered that Defendants, who were Northern companies, allegedly illegally partook in, and profited from, the institution of slavery in violation of Northern laws.

As Judge Posner considers, the injury here is not that Southern plantation owners or Southern companies, for whom it was unfortunately legal to own and trade slaves, enslaved Plaintiffs. Plaintiffs claim that Defendants were unjustly enriched by their *illegal* involvement in the slave trade, including slave ownership. If the illegal ownership of slaves and illegal involvement in the slave trade caused injury to Plaintiffs, and, as Plaintiffs claim, they could not discover this injury because Defendants concealed their involvement, then the statute of limitations did not accrue until Defendants' recent disclosures. However, Judge Posner neglects to instruct the trial court to investigate the possible misconduct by Defendants that deprived

Plaintiffs of legal recovery on the grounds that lots of companies profited from slavery, so Defendants probably did, too.

Such an assertion renders accrual-centered tolling doctrines toothless. At best, Judge Posner's assertion assumes that Defendants' profits were made legally, and thus ignores the substance of the injury in Plaintiffs' complaint. At worst, Judge Posner acknowledges that Defendants likely engaged in illegal slavery, and completely ignores their wrongdoing.

Determining whether several of the nation's most well-known and often-patronized corporations fraudulently concealed their illegal involvement in slavery both to escape prosecution in the Nineteenth Century and to maintain their relationship with consumers in the Twentieth Century is of enormous public interest, especially where such a lawsuit seeks to certify more than ten percent of the public as members of the plaintiff-class. Although Judge Posner asserts that *Bell v. Milwaukee* presented the "standard" for determining whether equitable estoppel applies, he ignored its balancing test. *Bell* requires the court to balance the gravity of Defendants' wrongdoing with the public interest in setting finite periods for timely claims.¹³⁰ However, instead of considering the public interest in discovering the validity of Plaintiffs' claims against the well-known and widely-patronized Defendants, Judge Posner completely ignores Plaintiffs' allegations of Defendants' fraudulent concealment. If Plaintiffs here "should have known" that corporations, including Defendants, engaged in the business of slavery in violation of Northern laws, then Plaintiffs in *Bell* should have known that in the 1950's white police officers would protect fellow white officers who murdered a man because he was black. As *Bell* demonstrates, such assertions are immaterial. According to the *Bell* standard, Judge Posner should have considered whether, if Defendants did conceal their illegal involvement in slavery from Plaintiffs, that act was so unfair that the public interest demands an exception to be carved out of the statute of limitations.

Furthermore, if Plaintiffs should have known that Defendants engaged in the business of slavery, it begs the question, why remand

¹³⁰ *Bell v. City of Milwaukee*, 746 F. 2d 1205, 1231 (7th Cir. 1984).

the consumer protection fraud claims for a trial on whether Defendants actively prevented Plaintiffs from obtaining information on Defendants' involvement in slavery? In order to prevail on such a claim, Plaintiffs must demonstrate that Defendant sellers misrepresented information material to a class of buyers, including Plaintiffs, fearing they would lose those buyers if they knew about Defendants' involvement in slavery. The consumer protection claim presupposes that such a class of buyers does not generally know that corporations it patronizes engaged in the business of slavery. Not only does Judge Posner fail to impose the proper balancing test in determining whether equitable estoppel should apply, he contradicts his own reason for its inapplicability by remanding the consumer protection fraud claims.

Discovery and evidence similar to that in a consumer fraud claim would result from a hearing on the issue of whether Defendants should be estopped from defending Plaintiff's claim as time-barred by the statute of limitations because both involve evidence of what Defendants did or did not conceal from Plaintiffs. Given the equitable nature of both Plaintiffs' claims of unjust enrichment and the applicable tolling doctrines, in addition to concerns for judicial efficiency and equity, Judge Posner should have remanded the equitable estoppel issue to the trial court pending a hearing on Defendants' alleged misrepresentations.

Reparations are restitutorial in nature, thus, they are focused on removing from the defendant the spoils of his unjust enrichment. As such, the issue of Defendant misconduct demanded a hearing. In *Slave Descendants*, Plaintiffs sought to establish a public trust with Defendants' disgorged profits, not to receive a personal financial benefit. Plaintiffs desired a forum in which Defendants' involvement in slavery would be made public, rather than to simply receive compensation, because it is in the public interest to know what Defendants actually did. The issue of causation is far more problematic in the case of reparations claims than it is when Plaintiffs' injuries are recent as with consumer fraud claims. Where Plaintiffs can more easily prove causation because less time has passed, Defendants have more incentive to settle and avoid an adverse judgment and

public scrutiny. Thus, notwithstanding the surviving consumer fraud protection claim, Plaintiffs may never receive evidence of Defendants' illegal involvement in slavery without the discovery phase of an equitable estoppel hearing.

Furthermore, the statute of limitations has been an insurmountable hurdle thus far in reparations cases. Though it is possible that Plaintiffs would not be able to prove a causal connection between their injury and Defendants' conduct at trial, an application of equitable estoppel in *Slave Descendants* would have provided a powerful precedent for future reparations claims. As in the case of the Tulsa riots claim, not all African American reparations claims are based on slavery. Reparations cases based on twentieth century harms, where the statute of limitations expired more recently, do not shoulder the same burden of causation that do slavery reparations cases. As with the Tulsa suit, however, courts often dismiss as time-barred reparations cases based on more recent injuries. A hearing on equitable estoppel for an injury that occurred over a century ago would demonstrate the truly far-reaching nature of equitable estoppel, and could provide dispositive precedent for more recent reparations claims.

CONCLUSION

Judge Posner's opinion in *Slave Descendants* gets it wrong with respect to both the law and the history it relies on. His opinion fails to consider the history of Northern involvement in slavery and the enduring nature of slavery and racism on both Northern and Southern courts. It also fails to apply the proper standard for equitable estoppel. Instead of providing precedent for other reparations suits plagued by statute of limitations problems, *Slave Descendants* supports the proposition that African Americans have never had access to a judicial remedy for slavery. Denied the solace of tolling doctrines such as equitable estoppel, future reparations litigation may abandon all hope of remedying the harms of slavery and Jim Crow, and instead focus on less problematic claims based on consumer fraud protection statutes.